STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS OF CONTRACTORS OF MICHIGAN; and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, Michigan Non-Profit Corporations,

Plaintiffs-Appellants,

Supreme Court No. 156737

Court of Appeals Case No. 331708

Oakland County Circuit Court
Case No. 10-115620-CZ

v.

CITY OF TROY, a Michigan Municipal Corporation

Defendant-Appellee.

Gregory L. McClelland (P28894)
Melissa A. Hagen (P42868)
McClelland & Anderson, LLP
1305 S. Washington Avenue, Suite 102
Lansing, Michigan 48910
(517) 482-4890
Attorneys for Plaintiffs-Appellants

Lori Grigg Bluhm (P46908)
Allan T. Motzny (P37580)
City Attorney's Office for the City of Troy
500 W. Big Beaver Road
Troy, Michigan 48084
(248) 524-3320

THE MICHIGAN MUNICIPAL LEAGUE'S, THE MICHIGAN TOWNSHIP ASSOCIATION'S AND THE GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN'S AMICUS CURIAE BRIEF

Miller, Canfield, Paddock and Stone, P.L.C.
Sonal Hope Mithani (P51984)
101 N. Main Street, 7th Floor
Ann Arbor, Michigan 48104
Attorneys for Amici Curiae
The Michigan Municipal League, The Michigan Township Association and
The Government Law Section of the State Bar of Michigan

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Other Authorities

STATEMENT OF JURISDICTIONAL BASIS

Amici curiae concur in the Appellee's Statement of Jurisdictional Basis.

STATEMENT OF QUESTIONS INVOLVED

Should the Court grant leave to appeal a Court of Appeals decision that affirmed the City of Troy's permit fees as a proper and lawful exercise of constitutionally-conferred municipal authority that undoubtedly complies with plain readings of both Section 22(1) of the State Construction Code Act and the Headlee Amendment?

Plaintiffs-Appellants answer:	Yes
Defendant-Appellee answers:	No
This Court should answer:	No
Amici curiae answer:	No

STATEMENT OF FACTS AND STANDARD OF REVIEW

Amici curiae concur in the Appellee's Counter-Statement of Facts and Standard of Review.

DESCRIPTION OF AMICI CURIAE

The MML is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). MML operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This amicus curiae brief is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of MML, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; Ebony L. Duff, city attorney, Oak Park; Steven D. Mann, city attorney, Milan; and William C. Mathewson, general counsel of the MML.

The Michigan Township Association ("MTA") is a Michigan non-profit corporation whose membership consists in excess of 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan. The MTA Board of Directors has authorized and directed this

office as attorneys for the MTA to file this amicus curiae brief in support of the Defendant-Appellee the City of Troy (City) regarding the issues in this lawsuit.

Finally, GLS is a voluntary membership section of the State Bar of Michigan, comprised of approximately 700 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although GLS is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. GLS provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. GLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, GLS participates in cases that are significant to governmental entities throughout the State of Michigan. GLS has filed numerous amicus curiae briefs in state and federal courts. GLS' Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this amicus curiae brief was authorized at the November 10, 2017 meeting of the Council. A quorum of the Council was present at the meeting (14 members), and the motion passed unanimously, 11-0, with three abstentions. The position expressed in this amicus curiae brief is that of GLS only and is not the position of the State Bar of Michigan.

INTRODUCTION

Plaintiffs seek leave to appeal what is nothing more than a garden-variety factual dispute regarding the reasonableness of rates. This case presents no legal principle of major significant to the state's jurisprudence. The Court of Appeals order (including the majority and dissenting opinions), the Plaintiffs' application for leave to appeal, and the City of Troy's (the "City") opposition are mired in a back-and-forth interpretation of the facts and how existing law applies

to those facts. Further judicial review of this matter will not result in new law or the clarification of existing law. Moreover, the Court of Appeals' conclusions are legally sound. They are not clearly erroneous nor do they result in any material injustice to the Plaintiffs. Instead, in affirming the legality of the City's building permit fees, the Court of Appeals implicitly upheld the belief that local governments are best suited to determine how to deliver sundry services to their citizenries. This finding is consistent with the inviolable tenet that under the Michigan Constitution, local entities have sizable power and discretion to govern their own interests. This case is not invoking "many instances of municipal finance manipulation." To the contrary, this case merely serves the interests of malcontents who think that if they do not like a particular cost incurred by the City, they do not have to pay for it – even though the cost clearly relates to the City's building services.

Fee (or rate) setting is without question a knowledge-driven municipal exercise. It reflects an understanding of the specific service being provided by a municipality, the anticipated demand for the service, the purchasing power of those demanding the service, the different ways the service can be delivered to residents and the strengths and weaknesses of each approach, and the cost and value of resources and personnel dedicated to providing the service depending on the selected manner of delivery. All of these considerations and more are weighed by municipalities as they undertake the formal process of setting a fee or rate.

Against this backdrop, the Court of Appeals concluded that the City of Troy's building permit fees not only properly covered the direct and indirect costs of the building permit services provided by the City and its contractor Safe Built of Michigan, Inc., but also properly included debt owed by the City's building department to the City's general fund for financing building permit services that had been provided by the department in the past. The Court of Appeals

decision is consistent with a policy that asks municipalities to reign in and limit fee increases. Although Plaintiffs contend that the City's arrangement with SafeBuilt is a "kickback" arrangement, the Court of Appeals disagreed. It upheld an arrangement that is specifically designed to advance Michigan's commitment to higher efficiency and affordability through privatization – a goal that was encouraged by the Michigan Legislature when it codified the ability to privatize building services. The decision is also in line with the purposes and intent of the State Construction Code Act (which is to provide for state uniformity in the *construction* of buildings but to provide local governments with the flexibility to set their own permit and inspection fees that allow them to recover the costs for services performed). It complies with the Headlee Amendment (Article 9, §31 of the Michigan Constitution) and the principles set forth in *Bolt v City of Lansing*. And, most importantly, it is consistent with the existing and broad authority the City has to self-govern under Michigan law, and the presumption afforded by Michigan law that the City's rate-making decisions are reasonable unless proven otherwise. There is no error to be found with the Court of Appeals' decision. For these reasons, this Court should deny the Plaintiffs' application.

ARGUMENT

I. THE COURT OF APPEALS' OPINION IS CONSISTENT WITH THE CITY'S BROAD AUTHORITY TO GOVERN LOCAL CONCERNS.

The Michigan Constitution expressly recognizes the power of local governments, mandating that "the provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, §34. Section 34 was added to the Constitution specifically for the purpose of guiding courts on how to treat

municipalities. When crafting this provision, the Michigan Constitutional Convention of 1961 remarked that this particular section was meant

> to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statues.

2 Official Record, Constitutional Convention 1961, p 3395. This right to self-govern is further underscored by Michigan courts. *See Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 687-690, 600 NW2d 339 (1999) (recognizing the broad powers of home rule cities to not only exercise powers "specifically granted," but also those "not expressly denied."); *Hughes v Almena Township*, 284 Mich App 50, 62, 771 NW2d 453 (2009) (reiterating the principle that courts must construe statutory powers in favor of townships).

As recently as May 2016, the Michigan Supreme Court held that the current Michigan Constitution directly reflects "the people's will to give municipalities even greater latitude to conduct their business," and reaffirmed the belief that municipalities thus have extensive authority over "municipal concerns, property and government," and should be allowed to exercise their powers without fear that every single action will be reviewed or second-guessed by the judiciary. *See Associated Builders and Contractors v City of Lansing*, 499 Mich 177, 186-87, 880 NW2d 765 (2016) (holding that municipality did not exceed its constitutional authority in enacting a prevailing wage ordinance). The Supreme Court firmly stated that "[u]nder our current Constitution, there is simply no room for doubt about the expanded scope of authority of Michigan's cities and villages." *Id.*

The Michigan Supreme Court's ruling in *Associated Builders* is just one of several cases in which Michigan courts have long respected the role of local governments and have conceded

their own limits when reviewing decisions made by municipal entities. Over 80 years ago, the Michigan Supreme Court acknowledged the independent right municipalities have to self-govern and to not have their governance contained by the judiciary:

> When the municipal officers of a city, vested by the Constitution and laws of the state with the right, power, and authority to administer local self-government, in good faith, reduce the policy force of a city, abolish offices, consolidate departments, cut expenses, and seek to balance their budget, ***neither the Legislature nor the court may control their action.***

Smith v City Commission of Flint, 258 Mich 698, 701-02, 242 NW 814 (1932) (emphasis added). Michigan's local governments are undeniably "empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance." *Adams*, 234 Mich App at 687-88, 600 NW2d 339, *quoting Detroit v Walker*, 445 Mich 682, 687-90, 520 NW2d 135 (1994).

The provision of building services in a city is a local concern. Inspections, permitting and plan reviews – all of these building-related tasks have clear local ramifications in terms of parcel development, the safety of local residents, and the character of a community. While the state has concerns with respect to how buildings are constructed and to what standard, municipalities are tasked with oversight of this building process and ensuring that the process is consistent with community values, needs and resources. Were the City stripped of all discretion as it relates to its building department activities (as Plaintiffs ask this Court to do), this Court would be trampling on the City's right to self-govern – a right inherently recognized by the Court of Appeals in its decision to affirm the lower court. Thus, this decision should stand.

II. THE COURT OF APPEALS' ANALYSIS CONFORMS TO THE STATE'S APPROACH TO STATUTORY INTERPRETATION.

The Court of Appeals adhered to long-standing principles of statutory interpretation when concluding that the City of Troy has neither violated nor exceeded its authority under Section 22

of the Construction Code Act ("CCA"), MCL 125.1522, especially when that authority is construed, as it should be, in favor of the City. A proper reading of the provision requires that it be construed "not in isolation [as Plaintiffs suggest], but with reference to and in the context of related provisions, in order to give effect to the whole enactment." *Guitar v Bieniek*, 402 Mich 152, 158, 262 NW2d 9 (1978). The interpretation should not only "bear[] in mind the purpose of the Legislation," but also "arrive at a harmonious whole." *Slater v Ann Arbor Public Schools Bd of Educ*, 250 Mich App 419, 429, 648 NW2d 205 (2002); *see also VanGessel v Lakewood Public Schools*, 220 Mich App 37, 41, 558 NW2d 248 (1996) (stating that courts "must look to the object of the statute and the harm that it was designed to remedy and apply a reasonable construction in order to accomplish the purpose of the statute" while reading the provisions "in the context of the entire statute a harmonious whole."). The Court of Appeals used these guiding precepts and properly concluded that Section 22 confers authority upon the City to use its fee revenue to cover not only current fiscal year expenses, but past year expenses (including incurred debt), as well.

In particular, the majority offered a robust analysis of the terms of the CCA and explained how the plain terms of Section 22 evince legislative intent to allow for fees that recover costs associated with building department activities performed in the past and present. In contrast, the dissent (which relies heavily on a misconstruction of record evidence and a misplaced understanding of the burden of proof) offers no language to support its interpretation that the phrase "acts and services performed" relate only to acts currently performed (and provides no legal support for why it would be appropriate to read the term "currently" into the statute). It also advances a construction of the term "operation" that is temporally limited in a way not suggested by the plain language of the statute itself. The dissent's legal analysis of

Section 22(1) (which is what Plaintiffs would have this Court adopt upon further review) would be contrary to the state's recognized approach to statutory construction – which is to not read in terms that do not exist. *Nickola v MIC Gen Ins Co*, 500 Mich 115, 894 NW2d 552, 557 (2017) ("We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. It is not within the province of this Court to read therein a mandate that the Legislature has not seen fit to incorporate.")(quotations omitted). There is no compelling reason to revisit the Court of Appeals' decision, especially when it offers a sound interpretation of Section 22(1) that is consistent with the state's view of statutory interpretation and with the constitutional mandate that requires courts to interpret statutory provisions such as these liberally in favor of a municipality.

Indeed, adopting the dissent's construction would effectively limit an entity to recovering costs related only to a "present state of functioning" and would foreclose the entity from ever being able to use debt to leverage performance. This is just counter-intuitive. It would imply that entities cannot rely on the general fund to cover expenses when there are shortfalls in revenues and reimburse the general fund over time. It would imply that entities cannot undertake large expenditures financed by bonds or loans from the general fund and then repay them on an appropriately-amortized basis. It would eliminate a major source of financing for municipalities, financing that operates no differently than business loans and lines of credit do in the non-governmental world (except that the obligation to repay a general fund loan is arguably more critical because to not do so would result in taxpayers funding a service that directly benefits other persons in a distinctly measurable way). It would necessarily mean that "debt" is not an appropriate cost to recover in any setting because loans are almost always repaid (and therefore, an expense line item) after they are used to cover an expenditure that is immediately due. This is

contrary to the common understanding of how municipal organizations operate in the real world given real world constraints. And it undermines a municipality's ability to properly fund acts and services that accomplish the CCA's purpose, which is, among other things, to govern the construction, alteration, demolition, occupancy, and use of buildings and structures. The majority opinion from the Court of Appeals is firmly rooted in state law that treats debt as a reasonable cost of doing business and providing services. *See infra*, at 13-14. It is neither clearly erroneous nor inconsistent with Michigan law and fails to warrant further review.

III. THE HEADLEE AMENDMENT WAS NEVER INTENDED TO APPLY TO QUINTESSENTIAL "FEES" LIKE THE CITY'S BUILDING PERMIT FEES.

Since the Michigan Supreme Court's decision in the seminal *Bolt v City of Lansing* – a case that sets forth three factors to use when deciding whether a municipal charge is a fee or a tax under the Headlee Amendment – plaintiffs have steadily increased their challenges to municipal fees over the past eighteen years. More and more, these cases do not seek to challenge the purpose and overall proportionality of fee revenues under Headlee; rather, they seek to use Headlee to challenge particular line-item expenses being recovered by the assessment of the fee – as is the case here. It cannot be that this type of judicial micro-management and second-guessing of rate setting was intended by the Headlee Amendment, yet that is precisely what the Plaintiffs invite this Court to do. The Court of Appeals, however, declined Plaintiffs' entreaty and instead, reviewed the City's building department permit fees as it should – based on its overarching character and its reasonable relationship to the costs of the services provided in exchange for the fees. This Court should follow suit.

Plaintiffs' challenge the City's building department fees under Article 9, Section 31 of the Michigan Constitution – i.e., the Headlee Amendment:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without approval of a majority of the qualified electors of that Local Government voting thereon.

Const 1963, art 9, §31. The Drafters' Notes to the Headlee Amendment, notably, never mention the concept of "fees" when discussing this provision. Rather, the Notes refer to the term "tax," acknowledging that the provision "was intended to prohibit local units from levying any new tax that might be authorized after the effective date of the amendment without voter approval. It also was intended to prohibit any local unit from increasing the rate of an existing tax beyond the limit established by law or charter after the effective date of the amendment." Headlee Drafters' Notes at 11 (attached as Ex. **1**) (emphasis added). Nowhere do the Notes state that Section 31 was intended to cover municipal charges.

For decades, Michigan courts have reviewed whether municipal charges are valid, the settled law being that the amount of a fee is presumed reasonable unless established otherwise. *Merrelli v City of St Clair Shores*, 355 Mich 575, 583-84, 96 NW2d 144 (1959). The presumption is grounded in the belief that "what is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case." *Id.* Although courts have historically evaluated whether fee revenue was "wholly out of proportion" (see *infra* at 12) to the involved expenses (rendering the fees taxes at that point), before 1994, courts were ***not*** evaluating user fees under the Headlee Amendment.[1]

[1] Article 9, §31 cases brought prior to 1994 sought to challenge the legality of millage increases or tax levies. *See, e.g., Fahnenstiel v City of Saginaw*, 142 Mich App 46, 368 NW2d 893 (1985) (seeking to enjoin city from levying 6.67 mills); *Gross Ile Committee for Legal Taxation v Township of Gross Ile*, 129 Mich App 477, 342 NW2d 582 (1983) (alleging that township's property tax levy exceeded constitutional limit); *Smith v Scio Twp*, 173 Mich App 381, 433 NW2d 855 (1988) (challenging township mill limit); *O'Reilly v Wayne County*, 116 Mich App 582, 323 NW2d 493 (1982) (action seeking to enforce Headlee Amendment limits on local property taxes); *Saginaw County v Buena Vista School*

Continued on next page.

Then, in 1994, the Blue Ribbon Commission on the Headlee Amendment introduced the concept of fee challenges in the context of Headlee. *See* Headlee Blue Ribbon Commission Report, Section 5 (Excerpts attached as Ex. **2**). In its report, while the Commission confessed that municipal fees do not abridge "the letter" of the Headlee Amendment, it still argued that their violation of "the spirit" of the Headlee Amendment compelled it to find as a matter of course that "any charge, fee, excise, or other monetary demand imposed under authority of statute, charter, regulation or ordinance by a unit of local government, including any authority, is a 'tax' under the provisions of the 'Headlee' amendment unless it is . . . [f]ee for service."

After the 1994 publication of the Headlee Blue Ribbon Commission Report, plaintiffs started challenging user fees in the context of the Headlee Amendment. In 1999, when the Michigan Supreme Court decided *Bolt v City of Lansing*, it interpreted Headlee using the rule of "common understanding" to arrive at the people's intent in ratifying the Amendment. It considered that the Amendment "grew out of the spirit of tax revolt" and was designed "to place public spending under direct control." *Bolt v City of Lansing*, 459 Mich 152, 160-61, 587 NW2d 264 (1999). In *Bolt*, the Michigan Supreme Court was not creating a "new" standard, but rather was setting forth a standard that encapsulated principles from prior cases that had offered guidance on whether a charge was a fee or a tax. *See Bolt*, 459 Mich at 159-162, 587 NW2d

---

Continued from previous page.
District, 196 Mich App 363, 493 NW2d 437 (1992) (challenging school district millage increase); *Taxpayers United for Michigan Constitution, Inc v City of Detroit*, 196 Mich App 463, 493 NW2d 463 (1992) (challenging adoption of City Utility Users Tax Act without first requiring voter approval); *Bailey v Muskegon County Bd of Comm'rs*, 122 Mich App 808, 333 NW2d 144 (1983) (challenge to imposition of taxes under accommodations tax ordinance); *Commuter Tax Ass'n of Metropolitan Detroit v City of Detroit*, 109 Mich App 667, 311 NW2d 449 (1981) (interpreting the scope of the term "voter approval" under Article 9, §31); *Plymouth Twp v Wayne County Bd of Commr's*, 137 Mich App 732, 359 NW2d 547 (1984) (deciding whether statute that required assessed value of residential class to increase over inflation rate violated the Headlee Amendment).

264.[2] Thus, nothing in *Bolt* alters the fact that under Michigan law, constitutional provisions affecting municipalities must be construed in their favor. *See* Const 1963, art 7, §34.

The Blue Ribbon Commission acknowledged that its concern with user fees was based on the fact that municipalities could use the money collected from a fee to pay for things "other than the service they were originally 'attached' to" or to pay more than the costs of service, allowing the governmental unit to spend the excess on other, unrelated activities. Blue Ribbon Commission Report at 66. The standard for proving that a municipal fee is unrelated or not attached to the service provided is a high one, with courts having previously held that fees charged by a municipality are "presumed reasonable unless it is facially or evidently so 'wholly out of proportion to the expense involved' that it 'must be held to be a mere guise or subterfuge to obtain the increased revenue.'" *Kircher v City of Ypsilanti*, 269 Mich App 224, 231-32, 712 NW2d 738 (2005) (emphasis added).

Here, the Court of Appeals properly recognized that the City's permit fees are tied to the costs of service because there is no evidence that shows that these fees are not being used for costs associated with the City's building department activities. Instead, what the evidence shows is this: fee revenue is not being used to pay for other, unrelated functions of government. Rather, the fee revenue is being used to cover costs (including the reimbursement of loans) that at all times have related to the City's provision of building permit services. In fact, these building permit fees are undoubtedly Headlee compliant because they are exactly the type of permissible user fees contemplated by the Blue Ribbon Commission. *See* Blue Ribbon Commission Report at 68 ("A 'fee for service' or 'user fee' is a payment made for the voluntary receipt of a

[2] *Citing Vernor v Secretary of State*, 179 Mich 157, 146 NW 338 (1914); *Ripperger v Grand Rapids*, 338 Mich 682, 62 NW2d 585 (1954), *Bray v Dep't of State*, 418 Mich 149, 341 NW2d 92 (1983); *Merrelli v St. Clair Shores*, 355 Mich 575, 96 NW2d 144 (1959), *Saginaw County v John Sexton Corp of Michigan*, 232 Mich App 202, 591 NW2d 52 (1998).

measured services, in which the revenue from the fees are used only for the service provided. ***Examples include . . . license and permit fees***.") (emphasis added).

The only reason there is any question about the validity of the City's permit fees is because the Plaintiffs are trying to use Headlee to challenge the wisdom of the City's decision to include certain line item costs in the recovery of the fee – specifically, the use of fee revenue to reimburse the general fund for prior loans made to the building department when fee revenue failed to cover costs and resulted in a deficit operating position. But Michigan courts have repeatedly refused to engage in a line-by-line analysis of the costs underlying a fee. *See e.g.*, *Meadows Valley LLC v Village of Reese*, No 309549, 2013 WL 2494994, *5 (Mich App June 11, 2013) (fee's reasonableness is presumed when city's "financial statements show that the operating expenses exceeded the charges for services every year") (unpublished op. attached as Ex. **3**); *Waterchase Associates, LLC v City of Wyoming*, No 225209, 2001 WL 1011889, *1 (Mich App Sept 4, 2001)(fees upheld as reasonable when fees imposed to implement property inspection program "were not sufficient to pay all allowable costs, i.e., salaries and other costs solely attributable to the program itself") (unpublished op. attached as Ex. **4**); *USA Cash # 1, Inc v City of Saginaw*, 285 Mich App 262, 282, 776 NW2d 346 (2009) (comparing annual fee revenues to overall salary and benefits provided to support services).

Regardless of whether it is appropriate for a court to parse municipal cost allocations in such fine detail, the Court of Appeals recognized that the Plaintiffs' challenge to this disputed cost component here – i.e., debt – is misguided under Michigan law. Cases distinguishing fees from taxes have routinely recognized that both direct and indirect expenses (which can often include debt) are proper costs to recover through fees. *See, e.g.*, *Merrelli v City of St Clair Shores*, 355 Mich 575, 588, 96 NW2d 144 (1959) (allowing recovery of both direct and indirect

costs of administering and enforcing police regulation); *Kircher*, 269 Mich App at 231-32, 712 NW2d 738 ("Fees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged."); *Bolt*, 459 Mich at 164, 587 NW2d 264 (looking to whether fee was "in excess of the direct and indirect costs" of using the system services). And, as recently as 2015, the appellate court in *Trahey v City of Inkster* plainly held that debt that resulted from the borrowing of money from other funds was part of a city's direct and indirect costs of providing services and was not a cost component that would be dissected:

> We ***disagree*** with plaintiff that the portion of the water and sewer rate accounting for debt was not part of the city's actual cost of providing water and sewer services. ***Although rate making is a prospective operation, past expenses and costs may be taken into account*** . . . Timely payment of the water and sewer department's debt was necessary for its continued operation, and therefore constituted part of the actual cost of providing the service. Plaintiff has not provided evidence showing that the method chosen by the city to maintain its operations and repay its debts was unreasonable, and absent evidence of impropriety, we will not independently scrutinize the municipal ratemaking methods employed by the city.

Trahey v City of Inkster, 311 Mich App 582, 597-98, 876 NW2d 582 (2015) (emphasis added). But perhaps most compelling is the fact that Michigan courts have already treated debt as a permissible cost to recover through fees in Headlee cases. *See Tobin Group, LLP v Genesee County*, No 248663, 2004 WL 2875634 (Mich App Dec 14, 2004) (ruling that a County Capital Improvement Fee that included present costs and debt service was valid and not a tax) (unpublished op. attached as Ex. **5**); *Futernick v Sumpter Twp*, No 221697, 2002 WL 483507 (Mich App Mar 26, 2002) (concluding that Headlee did not apply to revised sewer rate imposed to fund and retire debt) (unpublished op. attached as Ex. **6**). Plaintiffs provide no sound reason to change course and suddenly treat debt as an invalid cost of doing business.

In all, Michigan law authorizes the inclusion of debt in those costs that may be recovered through municipal fees, and the Court of Appeals in this case has merely adhered to existing precedent in this regard. This is not surprising because, like any business, municipalities suffer from shortfalls in cash due to timing of expenses and revenues, unexpected decline in demand and corresponding revenue, and higher than budgeted costs and expenses. It is not uncommon for governmental entities to rely on transfers from their general funds to address these hiccups in managing financial resources, and on the ability to pay back the general fund in order to ensure that the municipal department that is responsible for the services being provided is also ultimately responsible for the costs of those services.

Although the City's use of its fee revenue to repay loans from the general funds is valid, it is questionable whether such probing inquiry by the judiciary into the costs underlying a municipal fee is even appropriate given the clear authority that municipalities have under the Michigan Constitution to self-govern and steer their own day-to-day affairs. Courts have the responsibility to achieve the purposes underlying the Headlee Amendment – i.e., "to place public spending under direct control." But they also have the obligation to exercise the constraint contemplated by the Constitution, which is exactly what the Court of Appeals did in this case. Judicial review is not warranted simply because a ratepayer is upset with having to cover a cost that the municipality has determined is related to the service. If Plaintiffs disagree with the cost allocations, they can still place public spending under direct control by appearing and protesting at municipal meetings, where such rates and fees are set and approved, and at the ballot box, where dissent can be expressed by ousting those decision-makers responsible for controversial choices. But this simple disagreement over the "reasonableness" of a cost component is not a

legal principle of major significance to the state's jurisprudence. Leave to appeal should be denied.

IV. THE COURT OF APPEALS' DECISION FURTHERS STATE POLICY THAT ENCOURAGES THE USE OF PRIVATIZATION AS A COST-SAVING MEASURE.

Plaintiffs classify the 20-25% that the City retains in building permit fee revenue as a "kickback." In truth, this fee revenue is used to cover the cost of certain City employees who are tasked with oversight and other CCA-related duties that complement those of Safe-Built – a private company with whom the City has contracted to provide building services.

The undeniable trend is towards engaging the private sector in providing state and municipal services, with the primary aim of improving quality and reducing the costs to taxpayers. *See, e.g.*, Stephanie Rozsa & Caitlin Geary, *Municipal Action Guide: Privatizing Municipal Services*, National League of Cities (2010) (noting that "[t]he average American city currently works with private partners to perform 23 out of 65 basic municipal services").[3] Michigan is no exception. The state has recognized that privatization is a valuable option for providing municipal services, specifically with respect to the very services at issue in this case. Michigan law expressly authorizes municipalities to contract with the private sector to provide for enforcement of the State Construction Code. *See* 2012 PA 103 (codified at MCL 125.1502a and 1509); Ryan Stanton, *Michigan House Passes Legislation Allowing Privatization of Local Building Departments*, Ann Arbor News (Dec 1, 2011).[4] State-appointed emergency managers also favor engaging private contractors to provide municipal building services – further evidence that state policy is to give municipalities the option of providing services through relationships

[3] http://www.nlc.org/documents/Find%20City%20Solutions/Research%20Innovation/Economic%20Development/privitizing-municipal-services-gid-10.pdf (attached as Ex. **7**).

[4] http://www.annarbor.com/news/michigan-house-passes-legislation-allowing-privatization-of-local-building-departments/ (attached as Ex. **8**)

with the private sector. For example, emergency managers in Hamtramck and Lincoln Park have contracted with SafeBuilt to provide building inspection services. *See* Cathy L. Square, Hamtramck Emergency Manager Order No. S-005 (Nov 12, 2013)[5]; *Harper Woods and Lincoln Park Join Growing List of Michigan Communities Partnering with SafeBuilt*, safebuilt.com (Jan 13, 2015).[6]

Even before the enactment of Act 103, it was "a common practice" for Michigan municipalities to provide building services through private companies. Stanton, *supra*. For example, in addition to Troy, approximately 16 other communities including Muskegon, Muskegon Heights, Norton Shores, Mundy Township, Owosso, Genoa Township, and Harper Woods have contracted with SafeBuilt, Inc. to provide building inspection and permitting services. *See, e.g.*, Dave Alexander, *SafeBuilt Lays a Foundation in Muskegon for the Potential of Consolidated Inspections Countywide*, MLive.com (Jan 30, 2014)[7]; *Owosso Selects Local Contractor to Manage Building Inspections*, owossoindependent.com (May 18, 2016).[8]

One of the keys to a successful public-private partnership is public oversight. *See, e.g.*, William D. Eggers, *Privatization Opportunities for States*, Mackinac Center for Public Policy (1993)[9]; John B. Goodman and Gary W. Loveman, *Does Privatization Serve the Public Interest?*, Harvard Business Review (Nov-Dec 1991).[10] Municipalities must be able to hold

[5] www.hamtramck.us/emergency/documents/11-13-13_Order-S-005.pdf (attached as Ex. **9**).

[6] http://safebuilt.com/wp-content/uploads/2015/01/Harper-Woods_Lincoln-Park-press-release_final.pdf (attached as Ex. **10**).

[7] http://www.mlive.com/news/muskegon/index.ssf/2014/01/safebuilt_lays_a_foundation_in.html (attached as Ex. **11**).

[8] http://owossoindependent.com/owosso-selects-local-contractor-manage-building-inspections/ (attached as Ex. **12**).

[9] https://www.mackinac.org/282 (attached as Ex. **13**).

[10] https://hbr.org/1991/11/does-privatization-serve-the-public-interest (attached as Ex. **14**).

private contractors to agreed-upon results and to hold them accountable for poor service or higher than anticipated costs. *See* Goodman & Loveman, *supra*. There is little value in a privatized service that is allowed to run amok and potentially result in higher, not lower, costs to municipal residents. And here, the system established by the City works because the contract with SafeBuilt has allowed the City to stabilize its building department costs and charge the same building permit fees for several years now.

By upholding the City's ability to recover the costs of oversight through its building department fees, the Court of Appeals has acted consistently with this state's goal of promoting privatization to benefit the public good. There is value in having this Court maintain that position by denying the Plaintiffs' application for leave to appeal. If Plaintiffs are allowed to successfully claim that the revenues used to cover these "oversight-related" costs are "kickbacks," the goal of privatization will be undermined because it will limit a municipality's ability to self-govern and maintain control over its vendors and contractors. Such a decision will encourage municipalities to shy away from privatization even if it presents a credible option for delivering better quality, lower-cost services to its citizens. And it would only serve to diminish the municipal authority the City has under the Michigan Constitution.

In short, there is no basis to review the Court of Appeals' decision because it already embraces sound public policy in favor of privatization. Expending costs to oversee and complement the efforts of a private contractor is a smart business expense, not an illegal kickback that warrants judicial intervention into the City's ratemaking function. To conclude otherwise would undermine the purpose of the legislation passed in 2012 (i.e., Act 103) and be contrary to the Michigan Legislature's intent to promote privatization.

CONCLUSION AND RELIEF REQUESTED

Amici curiae The Michigan Municipal League, The Michigan Township Association, and The Government Law Section respectfully request that the Court deny the Plaintiffs' application for leave to appeal and let stand the Court of Appeals' majority decision affirming the City of Troy's building permit fees as lawful and valid.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Sonal Hope Mithani

Sonal Hope Mithani (P51984)
101 N. Main Street, 7th Floor
Ann Arbor, Michigan 48104
Telephone: (734) 663-7786
mithani@millercanfield.com
Attorneys for Amici Curiae

Dated: December 27, 2017

30352843.2\060519-00031

EXHIBIT 1

Alexander Hamilton Life

Richard H. Headlee
President
Chief Executive Officer

TO: Interested Parties

FROM: Taxpayers United, RHH

SUBJECT: Drafters Notes

The Attached document was provided to the Michigan Legislature to aid in implementation of proposal E. It was provided by William Shaker, William Niskanen and Donald Reisig all members of the Amendment Language Committee.

There were some 42 people who served on the Drafting Committee including: Paul McCracken, Richard O'Neill, James Barrett, Allan Schmid, Walter Averill, Craig Stubblebine, Henry Dodge, Mike Sessa, a number of others and yours truly.

We have also attached a letter which was recently sent to two school districts elaborating on the scheme which the current administration has carried out to the detriment of property tax relief and assistance to local governments and schools. It is self-explanatory and fairly describes this fiscal shell game.

If you have any questions, please contact the undersigned.

Sincerely,

Richard H. Headlee

RHH:s
Attachments

Drafters' Notes - Tax Limitation Amendment (Proposal E, approved by the electors on Ncvember 7, 1978, as an Amendment to the Michigan Constitution of 1963.)

The spirit of the times from which this proposal grew was the "tax revolt" and it was the drafters' clear intent that the Tax Limitation Amendment be so interpreted.

The drafters' intent was to make the minimal changes from Proposal C (a similar tax limitation constitutional amendment which was drafted in 1974 and appeared on the 1976 Michigan general election ballot; but not approved by the electors at that time), consistent with adding more definitional specificity and strengthening provisions dealing with local taxation. The lanaguage of Proposal E is attached to these notes as Appendix 1 and, for historical comparison, Proposal C is attached as Appendix 2.

The section numbers refer to the section numbers of Article 9, labeled Proposal E in Appendix 1.

Section 25

The Preamble to the Amendment, Section 25, serves as a summary of Sections 26 through 34, inclusive and Section 6, as amended; and spells out that the objectives, purposes, and

intent of the drafters, petitioners and the voters are clearly to place specifically defined limitations on the revenues of both state and local governmental units and to place these limits under the direct and absolute control of the voters. It is also clear from the remaining sections that "limitations specified herein" mean tax and revenue levels existing at the effective dates of the amendment: October 1, 1980 for Sections 26, 27, 28 and December 22, 1978, for Sections 29 through 34, inclusive and Section 6, as amended. It was clearly not the intent to require voter approval of annual state budgets. The intent of "limitations specified herein" is explained with specificity in these notes, as they deal with each specific section.

Section 25 specifically prohibits the state from circumventing the intent of the amendment by shifting tax burdens from the state to local governmental levels. Any action by the state which would result, directly or indirectly, in increased local taxation through a shift in funding responsibility is clearly prohibited by this Section.

This Section and Sections 26 through 34, inclusive, together with Section 6, as amended, were intended to strengthen the process of direct voter approval over total taxation and spending levels; and it was intended that the legislative, judiciary, and administrative branches of government be so guided.

In essence, the drafters' intent was to place the total dollar size of Michigan's public sector under direct popular democracy while retaining the best features of representative democracy, vis-a-vis the allocation of resources within the voter approved overall spending limitations.

Section 26

This section defines the state revenue limit. The revenue limit is expressed in terms of the ratio of total state revenues, excluding federal aid and taxes levied for specified debt service in FY 1978-1979 over the personal income in calendar 1977 times the relevant income base. This avoids use of a specific percentage (such as 8.3%, as in Proposal C) and the charge that there would be a reduction if the limit were effective at that time.

There was strong sentiment that this percentage should be rolled back over a period of time; but the concensus was that a roll back was conceptually different and should be handled later with an independent amendment.

Section 33 defines "total state revenues" to include all general and special revenues, excluding federal aid, as defined in the budget message of the governor for FY 1978-1979. It was the drafters' intent for the definition of

"total state revenues" to be all inclusive, including revenues from licenses and permits and any and all other sources, except those revenue sources explicitly excluded by language in the amendment itself. It was the drafters' intent that any and all future revenues be treated like any revenues that exist upon approval of the amendment and be subject to the limit. Taxes imposed for the payment of principal and interest on bonds, approved by the voters and authorized under Section 15 of this article and loans to school districts authorized under Section 16 of this article, are excluded from the revenue limitation established in Section 26. Such taxes and federal aid are excluded both from the calculation of the 1978-79 revenue limit ratio and from the revenue limit computation in subsequent years.

In drafting this Section, there was concern regarding the danger of voting in November, 1978, on a proposal which uses revenues in 1978-1979 as a percentage of 1977 personal income as the limitation, since if the amendment were approved, the legislature would have the opportunity to increase taxes following the November election in order to build up the ratio. It was the drafters' intent that this not happen and the general consensus was that such a tax increase would be politically unlikely, and that if the legislature were so arrogant as to increase taxes following approval of the tax limitation amendment, that there would be an immediate

petition drive that would result in technical amendments which would reduce the percentage limitation.

Directly or indirectly federally mandated spending increases are not exempted from the provisions of this section. It is the concensus that any problems arising from such federal requirements would be cured later on by a federal tax limitation amendment.

This section requires pro rata refunds to taxpayers in the event that revenues exceed the dollar amount of the revenue limit by 1% or more of the limit. If the excess were less than 1% of the revenue limit, the excess can be either refunded pro rata, or placed in the budget stabilization fund, as determined by the legislature. If the excess of revenues were greater than 1% of the revenue limit, a transfer to the budget stabilization fund out of excess revenues is prohibited and all of the dollars in excess of the limit must be refunded on a pro rata basis. The drafters' intent in designing the 1% cushion was to minimize the administrative expense relating to tax refunds.

The pro rata provision was designed to prevent the legislature from indirectly creating a graduated income tax through over taxation followed by various refunding schemes, other than pro rata.

Section 27

This section defines conditions by which the revenue and spending limitations may be exceeded. Declaration of an emergency requires executive action and this section requires that an emergency must be declared by the Governor and approved by a two-thirds vote of members of each house. The procedures for an emergency declaration and approval are very specific in order to prevent the abuse of this section.

Section 28

This section provides for a balanced budget and reinforces the present constitutional requirement for a balanced budget. Past practices designed to avoid the constitutional balanced budget requirements, such as extending the fiscal year, are precluded by this section. Surplus is intended to include budget stabilization monies, permitting financing a budget stabilization fund within the revenue limit established in Section 26. It was not the drafters' intent to any way prohibit the creation of the budget stabilization fund within the limit, or to include budget stabilization funds from prior years within the revenue limitation formula.

Section 29

It was the drafters' intent to include all necessary state mandated cost increases in this provision, including but not limited to: changes in general law which increase local governmental costs, e.g., increases in the state minimum wage law; changes in the civil and criminal statutes, e.g., mandatory sentencing; federally encouraged changes in state law, e.g., unemployment compensation coverage; collective bargaining or compulsory arbitration mandates, land use regulations, etc. It was the drafters' intent that the words "activity or service" be broadly defined to require that the state pay for all costs mandated by state law or state directive after December 22, 1978. This section requires reimbursements to local units for necessary new costs from all state mandates requiring action after December 22, 1978. Such interpretation is also required by Section 25 which prohibits the state from requiring any new or expanded activities by local governments without full state financing...or from shifting the tax burden to local government. The phrase "required by existing law," is used to clarify the authority of the State to require local governments to increase their activities up to standards established by existing law without additional reimbursements. However, "new" administrative interpretation of existing law would require reimbursement.

"Necessary costs" means that the legislature may establish some criteria to determine effectiveness, such as average costs, state-wide. It was intended that the legislature implement this section through appropriate legislation, including appropriations to cover the necessary costs for mandated activity or service. No mandated activity or service should be legally binding on any local unit until the appropriations for such mandated activity or service is made and disbursed to the applicable local units.

The state is prohibited from reducing the state financed proportion of specific existing activities or services below that proportion funded by the state in the base year, i.e., fiscal year 1978-1979. It was the drafters' intent that the phrase "any existing activity or service required of Local Government by state law" be broadly construed to mean all activities or services performed by Local Government as a result of the State Constitution, state statute or state regulation, e.g., public elementary and secondary schools as defined by law. This provision does not guarantee, for example, that the proportion of state expenditures paid to a specific school district cannot be reduced. It does mean, however, that the proportion of state funding going to school districts, state-wide, for public elementary and secondary education shall not be reduced.

The State is prohibited from reducing the state financed proportion of existing specific programs required of local governments by state law or state directive. Future mandated programs shall be fully funded. It seeks to obviate any temptation the state might have to fund a new mandated program (e.g., rapid transit) by shifting funds from a previously mandated program (e.g., K-12 education).

This section does not necessarily prevent the state from shifting funds from general and unrestricted revenue sharing to the funding of a state mandated activity but it does prohibit shifting funds from state mandated programs unless the mandate for such programs is eliminated.

Section 30

The primary intent of this section was to prevent a shift in tax burden, either directly or indirectly from state to local responsibility. The phrase "taken as a group" permits the legislature to reallocate funds to local units of government, i.e., geographically or from one unit to another. It was the drafters' intent to rely on the political process to effect such allocations and not to limit the legislature's ability to create more effective and efficient governmental entities or to eliminate those local units which no longer serve any utilitarian purpose.

Additional or expanded activities mandated by the state, as described in Section 29 would tend to increase the proportion of total state spending paid to local government above that level in effect when this section becomes effective.

Section 31

Section 31 begins: "Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without approval of a majority of the qualified electors of that Local Government voting thereon." This sentence was intended to prohibit local units from levying any new tax that might be authorized after the effective date of the amendment without voter approval. It also was intended to prohibit any local unit from increasing the rate of an existing tax beyond the limit established by law or charter after the effective date of the amendment.

However, the intent of the wording was to permit Local units to retain those taxing powers they had by state law or local charter prior to the effective date of the amendment. Thus, a Local unit that was not levying or imposing the full amount of its taxing authority at the time of the effective date of the

amendment would continue to be able to exercise such power after the effective date of the amendment. For example, a city with a 20 mill limit in its charter that only levied 15 mills in 1978 could increase its millage rate up to its 20 mill charter limit without again going to the voters for approval. Likewise, a school district that had voter approval to levy extra voted millage at the time of adoption could increase its millage rate up to the amount authorized without again seeking voter approval, even though the maximum millage authorized might not have been levied in 1978.

Industrial facility taxes levied under authority of Public Act 198 of 1974 are taxes that "were authorized by law" when Section 31 would go into effect, and therefore, would be exempt from the local vote requirement.

The first paragraph of Section 31 provides that as assessed value is increased, the millage authorized for the taxing unit must be decreased in equal proportion to the increased assessment, with the only increase in revenue allowed from existing property being determined by the Consumers Price Index for the United States as reported by the United States Department of Labor.

The rollback provision of this section reads:

"...if assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized rate applied thereto in each unit of local government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized rate on the prior assessed value...". (emphasis added) "Existing authorized rate" was intended to refer to "maximum rate authorized by law or charter" when this Section is ratified.

This section recognizes that in many communities, property tax revenues have increased rapidly, without any increase in tax rates, due to the rapid increase in assessments. It was the drafters' intent to assure that tax revenues on existing property not increase faster than the general U.S. inflation rate, regardless of increases in assessments, without local voter approval. The growth of property taxes on existing property in a taxing unit is limited to the rate of inflation.

For particular years in which assessed valuation of property as finally equalized (excluding new construction) exceeds inflation the maximum tax rate authorized by law or charter

shall be rolled back to yield the same gross revenue from existing property (adjusted for inflation) as could have been collected at the existing authorized rate on the prior assessed value. The intent of the underlined phrase was to roll back the "maximum rate authorized by law or charter," even though the unit may have been levying a lesser rate. A key operative word in the phrase is "could." The effect of this provision shall be a continual ratcheting downward of maximum authorized tax rates whenever assessed values exceed inflation.

This section only operates to reduce maximum authorized tax rates in years in which assessed values, as finally equalized, increase faster than inflation. It does not allow "rolled back" rates to be increased under any conditions without voter approval. This is illustrated for a taxing unit in the following hypothetical example. (Exhibit 1) Presmises: the "maximum authorized rate" is 10 mills; spread rate (the millage levied in 1978) was 9 mills; assume the taxing authority continues to levy the same millage that it was levying in 1978 (9 mills) until the "maximum authorized rate" reaches a lesser level.

Year	Assessed Value (S.E.V.)	Change in Assessed Value (S.E.V.)	Inflation	Maximum Authorized Tax Rate	Spread Rate	Annual Property Tax Savings*
1978	$20,000,000			10.00 mills	9.00	--
1979	$23,400,000	17%	9%	9.32 mills	9.00	--
1980	$24,102,000	3%	7%	9.32 mills	9.00	--
1981	$25,789,140	7%	12%	9.32 mills	9.00	--
1982	$29,657,511	15%	8%	8.75 mills	8.75	$ 7,415
1983	$35,589,013	20%	10%	8.02 mills	8.02	$34,877
1984	$38,080,244	7%	7%	8.02 mills	8.02	$37,318
1985	$41,888,269	10%	7%	7.80 mills	7.80	$50,216

*Annual savings is calculated based on the difference between 1978 spread rate and the "maximum authorized tax rate." Annual savings in this example would be larger if it were assumed that the local governing body, in the absence of Tax Limitation, had spread taxes at the "maximum authorized rate" in 1979, 1980 and 1981, instead of continuing to spread at the 1978 level.

Exhibit 1

The impact of this provision is further illustrated in the attached table (Exhibit 2) which shows the impact on a taxing jurisdiction with a market value of $20 million in 1968, with S.E.V. increases, inflation rate and millage levy as shown in the table. It is assumed that the taxing jurisdiction is levying the maximum authorized rate for the purposes of this example.

It was clearly the drafters' intent that whenever a "maximum tax rate authorized by law or charter" is rolled back, the "rolled back" rate becomes the "new" maximum authorized rate,

(In Millions of Dollars)

Year	Assessed (S.E.V.)	% Change in Assessed (S.E.V.)	Inflation	Section 31 Millage under (E)	Property Taxes, Section 31 (without "E")	Property Taxes Section 31 (E)	Annual Property Tax Savings Section 31 (E)	Cumulative Annual Property Tax Savings Section 31 (E)
1968	10,000			40 mills	400.00	--	--	--
1969	11,450	14.5%	5.4%	36.82	458.00	421.59	36.41	36.41
1970	12,893	12.6%	5.9%	34.63	515.72	446.48	69.24	105.65
1971	14,556	12.9%	4.3%	31.99	582.24	465.65	116.59	222.24
1972	16,206	10.1%	3.3%	30.02	641.04	481.10	159.94	382.18
1973	16,956	5.8%	6.2%	30.02	678.24	509.02	169.22	551.40
1974	19,329	14.0%	11.0%	29.23	773.16	564.99	208.17	759.57
1975	20,102	4.0%	9.1%	29.23	804.08	587.58	216.50	976.07
1976	21,108	5.0%	5.8%	29.23	844.32	616.99	227.33	1,203.40
1977	21,530	2.0%	6.5%	29.23	861.20	631.47	229.73	1,433.13
1978	24,501	13.8%	7.5%	27.61	980.04	676.47	303.57	1,736.70

The cumulative savings, over the past ten years, had "E" been in effect, would have been $1,736,700 -- under the assumptions in this hypothetical example.

Exhibit 2

which will then serve as the base from which the next rollback would be calculated. Once a tax rate is rolled back under this section, it shall never be increased without voter approval.

A key phrase in this section is "rate authorized by law or charter." Local government officials would retain the authority to increase tax rates to the maximum rates authorized "by law or charter," even if such maximum rates are not presently levied. This does not change their present authority, with the exception that "maximum rates authorized" would be rolled back, over time, whenever assessed valuation of property as finally equalized (presently defined as S.E.V.) increases more than inflation. This section assures local voter control of the maximum authorized rates and the revenues generated at these rates.

"Rate authorized by law or charter" was selected rather than "rate existing at time of ratification" (the spread rate) because the drafters' intent was not to penalize the taxing authorities that were efficient enough to operate at less than their maximum authorized levels or who may have reduced millage due to some unusual circumstances below the authorized level. Furthermore, it was recognized that those maximum rates had been previously approved by voters and therefore, such an approach is consistent with the intent of the amendment.

To reiterate, it was the clear and absolute intention of the drafters to require that all property and local taxation be under direct voter control. In no way does this section allow for millage rolled back under this section to be restored without approval by a majority of the electors of the unit affected and voting thereon.

This section permits, but does not require the legislature to mandate, through enabling legislation, that a lower tax rate than "authorized by law or charter" be established, such as that tax rate in each unit effective on December 22, 1978. Although specification of this approach is not mandated, it clearly would be within the spirit of the tax revolt, from which this amendment sprang, to do so. In retrospect, it is noted that Proposal E ballot language stated "...the proposed amendment would...prohibit local government from adding new or increasing existing taxes without voter approval." Emphasis added. The legislature and the courts should be guided by the perception of the electorate in passing the amendment.

"The value of new construction and improvements" clearly means only new physical construction. Any increase in value because of zoning changes or for any other reason are not within the meaning of "new construction and improvements." New construction is intended to mean the amount of newly constructed property less losses. Failure to adjust for losses would

allow taxes on existing property to increase faster than inflation which is clearly contrary to the intent of this section.

The second paragraph of Section 31 was included by the drafters to protect the rights of the holders of bonds which had been properly issued and authorized prior to the effective date of the amendment. It was also intended to assure those bondholders that the constitutional amendment would not be applied retroactively to bonds issued and authorized prior to the effective date of the amendment. It was the intention of the drafters that this paragraph would apply only to completed transactions, i.e. to bonds issued and authorized, prior to the effective date of the amendment.

The drafters were very careful to spell out that the limitations provided in Section 31 in paragraph 1 did not apply to taxes that had been previously imposed for bonds that were issued and properly authorized prior to the effective date of the amendment. The drafters also recognized that if bonds had been improperly authorized and issued, prior to the effective date of the amendment, the bonds might be set aside or voided through litigation. It was not the intention of the drafters to protect the defective bonds from litigation or to prohibit such litigation.

Paragraph 2 of Section 31 was not in any manner or fashion intended to limit Article 9, Section 6 of the Tax Limitation amendment. Paragraph 2 of Section 31 was written totally independent of and separate from Article 9 Section 6 and had as its only intention the guaranteeing of contractual rights of individuals who had purchased bonds that were properly issued and authorized, i.e. completed, prior to the effective date of the amendment so that they would be protected from a reduction in millage under the provisions of paragraph 1 of Section 31. It was the clear intention of the drafters to prohibit the issuing or authorization of any unlimited tax obligation bonds in the State of Michigan after the effective date of this amendment without a vote of the electors.

Section 32

Any taxpayer of the state shall have standing to bring suit with original jurisdiction in the Michigan Court of Appeals to enforce the provisions of this amendment.

By costs, the drafters meant all expenses incurred in maintaining such suit, including, but not limited to filing fees, service fees, witness fees, discovery expenses, attorney fees and reasonable reimbursement for plaintiffs' time and travel.

Section 34

The legislature must implement the provisions of Sections 25 through 33, inclusive. It is the intent that state law be the authority for implementing the additions to this article and extension of legislative authority to any department, agency, etc., shall not occur.

Section 6

The drafting of Article 9, Section 6 changed only the wording in paragraph 2 of Section 6. The former wording of paragraph 2 Section 6 excluded certain taxes from the limitations provided in paragraph 1 Section 6 of the 1963 Constitution. All the limitations contained in the 1963 Constitution in paragraph 1 Section 6 were retained. The intent, and the only intent of paragraph 2 Section 6 was to require a vote by the people before any taxes could be imposed over and above the limitations contained in paragraph 1 Section 6. The changes in paragraph 2 Section 6 were intended specifically to prohibit the imposition of any taxes for the payment of principal and interest on bonds or other evidence of indebtedness, or for the payment of assessments or contract obligations in anticipation of which bonds are issued, which require the imposition of taxes over and above the limits set forth in paragraph 1 Section 6 unless the qualified electors

of the political subdivision wherein such taxes are to be imposed have approved through an election in that district the issuance of obligations that would require the levy of property taxes that would be in excess of said limits contained in paragraph 1 Section 6.

In paragraph 2 of Section 6 the drafters also imposed the limitations under Sections 25 through 34 of Article 9 on any taxes imposed for any other purpose, thus requiring that any increase in taxation of property in the State of Michigan shall not be allowed without the approval of the qualified electors of whatever entity attempts to increase such property taxes.

The drafters felt that the 1963 Constitution allowed governmental units to increase property taxes for the purposes listed in paragraph 2 of Section 6 over and above the limitations contained in paragraph 1 Section 6 without any direct control of such taxes that would exceed the limits in paragraph 1 Section 6, by the electors of any political subdivision, etc. The drafters' intent was to stop this situation and return to the people full control of all property taxation amounts that would exceed the limitations set forth in Section 6, paragraph 1.

It was understood by the drafters that any taxes levied under Section 6, paragraph 1 and within the limitations contained

therein could be used for any purpose consistent with the Constitution and the laws of the State of Michigan, including the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments or contract obligation in anticipation of which bonds were issued. To reiterate, it was the sole intention of the drafters of Article 9 Section 6 to require that all taxation of property be subject to approval by the qualified electors of whatever entity seeking to impose such property tax.

APPENDIX 1

PROPOSAL E (1978)

INITIATIVE PETITION
AMENDMENT TO THE CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT
ADDING SECTIONS 25, 26, 27, 28, 29, 30, 31, 32, 33, & 34 TO ARTICLE IX AND AMENDING SECTION 6 OF ARTICLE IX

Article IX of the Michigan Constitution is hereby amended by adding Sections 25, 26, 27, 28, 29, 30, 31, 32, 33, & 34, and by amending Section 6 to additions and amendments to read as follows:

Sec. 25. Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct vo approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proport of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through inclusive, of this Article.

Sec. 26. There is hereby established a limit on the total amount of taxes which may be imposed by the legislature in any fiscal year on the taxpayers of t state. This limit shall not be changed without approval of the majority of the qualified electors voting thereon, as provided for in Article 12 of the Constitu Effective with fiscal year 1979-1980, and for each fiscal year thereafter, the legislature shall not impose taxes of any kind which, together with all other revenu of the state, federal aid excluded, exceed the revenue limit established in this section. The revenue limit shall be equal to the product of the ratio of Total St Revenues in fiscal year 1978-1979 divided by the Personal Income of Michigan in calendar year 1977 multiplied by the Personal Income of Michigan in eit the prior calendar year or the average of Personal Income of Michigan in the previous three calendar years, whichever is greater.

For any fiscal year in the event that Total State Revenues exceed the revenue limit established in this section by 1% or more, the excess revenues shal refunded pro rata based on the liability reported on the Michigan income tax and single business tax (or its successor tax or taxes) annual returns filed follow the close of such fiscal year. If the excess is less than 1%, this excess may be transferred to the State Budget Stabilization Fund.

The revenue limitation established in this section shall not apply to taxes imposed for the payment of principal and interest on bonds, approved by t voters and authorized under Section 15 of this Article, and loans to school districts authorized under Section 16 of this Article.

If responsibility for funding a program or programs is transferred from one level of government to another, as a consequence of constitutio amendment, the state revenue and spending limits may be adjusted to accommodate such change, provided that the total revenue authorized for collection both state and local governments does not exceed that amount which would have been authorized without such change.

Sec. 27. The revenue limit of Section 26 of this Article may be exceeded only if all of the following conditions are met: (1) The governor requests the legislatu to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which t emergency will be funded; and (3) the legislature thereafter declares an emergency in accordance with the specifics of the governor's request by a two-thirds vo of the members elected to and serving in each house. The emergency must be declared in accordance with this section prior to incurring any of the expen which constitute the emergency request. The revenue limit may be exceeded only during the fiscal year for which the emergency is declared. In no event sh any part of the amount representing a refund under Section 26 of this Article be the subject of an emergency request.

Sec. 28. No expenses of state government shall be incurred in any fiscal year which exceed the sum of the revenue limit established in Sections 26 and 27 of t Article plus federal aid and any surplus from a previous fiscal year.

Sec. 29. The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Lo Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

Sec. 30. The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect fiscal year 1978-79.

Sec. 31. Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasi the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electo of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on t new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of proper as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Le from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue fro existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.

The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of t amendment.

Sec. 32. Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

Sec. 33. Definitions. The definitions of this section shall apply to Section 25 through 32 of Article IX, inclusive.

"Total State Revenues" includes all general and special revenues, excluding federal aid, as defined in the budget message of the governor for fiscal ye 1978-1979. Total State Revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments. It shall include the amount of any credits not related to actual tax liabilities. "Personal Income of Michigan" is the total income received by persons in Michig from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency. "Local Government" means a political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counti authorities created by the state, and authorities created by other units of local government. "General Price Level" means the Consumer Price Index for t United States as defined and officially reported by the United States Department of Labor or its successor agency.

Sec. 34. The Legislature shall implement the provisions of Sections 25 through 33, inclusive, of this Article.

APPENDIX 2

PROPSAL C (1976)

INITIATIVE PETITION
AMENDMENT TO THE CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT ADDING SECTIONS 25, 26, 27, 28, 29, 30, AND 31 TO ARTICLE IX

Sec. 25. There is hereby established a limit on the total amount of taxes which may be levied by the Legislature in any fiscal year on the taxpayers of this State. Effective with the first fiscal year beginning after the ratification of this Section, and for each fiscal year thereafter, the Legislature shall not impose taxes of any kind which, together with all other revenues of the State, federal aid excluded, will total more than 8.3% of the personal income of Michigan for the previous fiscal year or the average of personal income of Michigan for the previous five calendar years, whichever is greater. "Personal income of Michigan" means the total income received by persons in Michigan from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency.

For any fiscal year, in the event that State revenues, excluding federal aid, do exceed 8.3% of the personal income of Michigan reported for the previous fiscal year or the average of personal income of Michigan for the previous five calendar years, whichever is greater, the excess shall be refunded pro rata on the income taxes annual returns filed following the close of such fiscal year.

The limitation of this Section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness authorized under Sections 15 and 16 of this Article.

Sec. 26. The tax limitation of Section 25 of this Article may be exceeded only if all of the following conditions are met: (1) The Governor requests the Legislature to declare an emergency; (2) the request shall be specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; (3) upon receiving this request, the Legislature declares an emergency, in accordance with the specifics of the Governor's request, by a two-thirds vote of the members elected to and serving in each house. The emergency must be declared in accordance with this Section prior to incurring any of the expenses which constitute the specific emergency request. The tax limitation may be exceeded only for the fiscal year in which the emergency is declared; in the next and subsequent fiscal years the tax limitation of Section 25 of this Article shall again take effect. In no event shall any part of the amount representing a refund under Section 25 of this Article be the subject of any emergency request.

Sec. 27. No expenses of state government shall be incurred for any fiscal year which exceed in amount the revenue limitations imposed by Sections 25 and 26 of this Article.

Sec. 28. A new program or an increase in the level of service under an existing program shall not be required by the Legislature of units of local government, of authorities created by the state, or of political subdivisions of the state, unless a state appropriation is made and disbursed sufficient to pay the local unit of government, authority or political subdivision for the costs of the program. The provisions of this Section shall not apply to costs incurred pursuant to Article VI, Section 18.

Sec. 29. The proportion of state revenue paid to all units of local government, authorities created by the state, and political subdivisions of the state, taken as a group, shall not be reduced below that proportion in effect when this Section is adopted.

Sec. 30. Units of local government, authorities created by the state, and political subdivisions of the state are hereby prohibited from levying any tax not in existence when this Section is ratified or from increasing the rate or base of existing taxes beyond levels authorized when this Section is ratified, without the approval of a majority of the qualified electors of that local unit, authority or political subdivision voting thereon. The limitations of this Section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments or contract obligations in anticipation of which bonds are issued.

Sec. 31. The Legislature shall implement the provisions of Sections 25 through 30, inclusive, of this Article.

Section 6. (New language capitalized) Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real an tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the elector qualified under Section 6 of Article II of this constitution, voting on the question.

The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds APPROVED BY THE ELECTORS other evidences of indebtedness APPROVED BY THE ELECTORS or for the payment of assessments or contract obligations in anticipation of which bonds a issued APPROVED BY THE ELECTORS, which taxes may be imposed without limitation as to rate or amount; OR, SUBJECT TO THE PROVISIONS O SECTIONS 25 THROUGH 34 OF THIS ARTICLE, to taxes imposed for any other purpose by any city, village, charter county, charter township, chart authority or other authority, the tax limitations of which are provided by charter or by general law.

In any school district which extends into two or more counties, property taxes at the highest rate available in the county which contains the greatest pa of the area of the district may be imposed and collected for school purposes throughout the district.

PROVISIONS OF EXISTING CONSTITUTION ALTERED OR ABROGATED BY THIS AMENDMENT IF ADOPTED
- ARTICLE IX, SECTION 6 -

Section 6. Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property f all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article of this constitution, voting on the question.

The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidences of indebtedness or the payment of assessments or contract obligations in anticipation of which bonds are issued, which taxes may be imposed without limitation as to rate amount; or to taxes imposed for any other purpose by the city, village, charter county, charter township, charter authority or other authority, the limitations of which are provided by charter or by general law.

In any school district which extends into two or more counties, property taxes at the highest rate available in the county which contains the greatest p of the area of the district may be imposed and collected for school purposes throughout the district.

EXHIBIT 2

SECTION 5

Report on Compliance with Article IX, Section 31 (Local Voter Approval of Taxes)

I. Purpose and Text of Amendment

Quickly reviewing the text of the ballot description language for this section of the amendment, and the text in both section 31 and the preamble section 25, gives an excellent understanding of its purpose and the foundation for resolving current controversies. The discussion can be broken down into two parts: local taxes in general, and local property taxes in particular.

Local Taxes in General

The ballot description of the "Headlee" amendment in 1978 included the following:

> THE PROPOSED AMENDMENT WOULD:
>
> . . .
>
> .....2. Prohibit local government from adding new or increasing existing taxes without voter approval.

Section 25 of the amendment, which states the general purpose of the amendment, begins with the following sentence:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval.

Section 31 of the amendment begins with the following sentences:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base.

Thus, it is clear that the voters intended to absolutely require voter approval for any new local tax, or an increase in the rate of any existing tax. Indeed, the amendment even requires that a revenue-increasing expansion of the base of any tax must result in a reduction in the rate.

It is also clear that the rate of taxation limited by the amendment is that rate authorized by the voters, which is referred to as the "maximum authorized rate" or the "rate authorized by law or charter." This connects seamlessly with the approval of the local voters for any charter millage or other property tax millage under the limitations of Article IX section 6, and the approval of the elected legislature for those taxes authorized for levy by local units of government prior to the effective date of the amendment. This authorized rate must be reduced when the base of a tax is increased. For property taxes, the amendment specifically defines a mechanism for reduction in the authorized rate, as set forth below.

As the drafters notes make explicit and the amendment makes implicit, local units can levy *less* than their full authorized rate without creating any constitutional barrier to subsequently increasing their rate, as long as they remain under the maximum authorized rate.

Property Taxes in Particular

Section 31 continues after the sentences excerpted above to create a specific mechanism for reducing the authorized property tax rate when assessments increase faster than the rate of inflation. This is in accordance with the two previous sentences, which require voter approval for any new or increased local tax, and require a proportional reduction in the rate of any existing local tax when its base is broadened:

> ... If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

This is the best-known portion of the amendment, which establishes "Headlee rollbacks" in authorized property tax rates whenever the assessed value of existing property increases faster than the inflation rate. The amendment here also continues the principle established in Article IX section 6 that bonds issued prior to the amendment can be repaid with unlimited taxes. The "Headlee" amendment changed section 6 to require voter approval for new local general obligation bonds that allow unlimited taxes to be levied for their repayment.

II. Controversies

A. New Local Taxes

Section 31 prohibits units of local governments from levying any new tax, or expanding the base of an existing tax, without a vote of the people. A "new" tax is any tax authorized after the effective date of the Headlee amendment. It is clear that local taxes authorized by the legislature *before* December 23, 1978 do not require local voter approval. Any local tax, whether authorized before or after December 23, 1978, must have its rate reduced if the base of the tax is expanded.

Testimony at the commission revealed a number of local taxes that had been authorized after the effective date of the Headlee amendment, but had never been subjected to a local vote. Examples included the (Detroit) City Utility Users Tax (1972 PA 309, MCL 141.801), which expired but was re-enacted with numerous changes and made retroactive to 1988 by the legislature. Despite a court challenge,[1] the new Utility Users Tax, which had a new public act number (1990 PA 100), a new section of the Michigan Compiled Laws (MCL 141.1151), and many substantive differences from the old tax, never was approved by the Detroit voters.

Another example is the Airport Parking Excise tax (1987 PA 248, MCL 207.371), levied at a rate of 30% on private airport parking facilities. The revenue from this tax, although ostensibly imposed by the state, flows directly back to the cities and counties in which a regional airport is located.[2]

A further example of local taxes that have escaped constitutional limitations are the "assessments" levied under the Community Convention or Tourism Marketing Act (1980 PA 395, MCL 141.871), Convention and Tourism Marketing Act (1980 PA 383, MCL 141.881), and the Regional Tourism Marketing Act (1989 PA 244, MCL 141.891). These statutes allow a tourism bureau, made up of local hotel and motel owners, to levy a 1% or 2% tax on accommodation charges in establishments with over 10 rooms. The statutes require only that a marketing plan be filed with the Department of Commerce, which then conducts a referendum among the hotel and motel owners. Should a majority of the "votes" (calculated as one vote per room) approve the plan, the tax goes into effect. Taxes must be shown on the bill paid by the consumer, and unpaid taxes are subject to delinquent charges. These statutes effectively create local authorities that levy taxes and make expenditures without any control by the citizenry.[3]

A very similar statute, the "Tiger Stadium Tax" act (1991 PA 180, MCL 207.751) authorizes an explicit excise tax on hotel and motel accommodations in municipalities or counties constructing or

---

[1] *Taxpayers United v City of Detroit,* 196 Mich App 463 (1993), rehearing denied, leave to appeal denied (1993).

[2] There is a slight difference between the returning revenue and the actual revenue; the returning revenue is based on a population share of those counties who have regional airports. This would likely be close to a dollar-for-dollar return. The state's actual interest in the revenue is clear from sections 8 and 9 of the Act, which authorize a county to pledge its revenue for the repayment of the bonds, authorize the State Treasurer to distribute the revenue to the bond trustee directly, and expressly reject any state indebtedness or pledge of credit.

[3] In addition to the violation of section 31 of the Headlee amendment, these acts also violate Article IX section 2, which states that the power of taxation cannot be surrendered or contracted away; Article IV section 32, which states that every law which authorizes a tax must distinctly state the tax, and the principle of "one man one vote."

reconstructing a stadium or convention facility. Under the Headlee amendment, such a tax must be approved by the voters of the municipality, and none has yet sought such approval.[4] The similarity between the explicit excise tax on hotels and the "assessments" is so strong as to make them almost indistinguishable--as indeed they are to the hotel customer.[5]

In addition, there were many more instances cited of expansions in the base of a local tax that had not resulted in a reduction in the rate. This included the 1986 changes in the base of the local (city) income tax, which resulted through legislation in a change in the effective rate of the state income tax, but not to the effective rate of local income taxes.

There is no statutory implementation of this provision of section 31.

Findings and Recommendations

The commission recommends that the legislature implement Article IX section 31, placing into statute the constitutional requirement that any new tax imposed by a local unit of government must be approved by the voters.
A "new" tax should be defined as any tax not authorized on December 23, 1978, or whose authorization expires after that date.

A "local" tax should be defined as any tax imposed by a political subdivision of the state, other than a state tax imposed by the legislature. Any tax imposed by the state or a political subdivision of the state must be governed by either the Article IX section 26 state revenue limit or the Article IX section 31 voter approval requirement for local government taxes.

"Tax" should be defined as presented in the next section of this report.

The commission also specifically recommends that the legislature require local voter approval of the Airport Parking Excise Tax, which was authorized by the legislature in 1987 and has never been approved by local voters; the three Tourism Marketing Acts, which were authorized in 1980 and 1989 and allow non-voter approved excise taxes on hotel and motel accommodations; and any other new local taxes that have not been approved as required by the Constitution.

---

[4] A portion of the "Tiger Stadium Tax" would be unconstitutional: the allowance of an additional excise tax on restaurant charges, above the current 4% constitutional maximum. Michigan's constitution does not establish a limit on sales (use) tax rates on services, so a voter-approved local excise tax on hotel charges would not violate the constitution. *Bailey v Muskegon Co. Bd. of Comm'rs* (1983) 333 NW2d 144, 122 Mich App 808.

[5] For example, following the principle of avoiding double taxation, The "Tiger Stadium Tax" Act specifically excludes "assessments" charged for the local tourism boards from its tax base in section 2(2), and the three Tourism Marketing Acts allow taxes levied under only one of the Acts.

B. Taxes and "Mandatory User Fees"

Background

One of the most frequent abridgments of the spirit, if not the letter, of the 1978 Headlee Amendment to the Michigan Constitution has been the imposition of mandatory "user fees" (and certain other similar exactions) by local units of government. These exactions are similar, if not identical, in purpose and incidence as taxes, but are called something else and escape the constitutional requirements for taxes.

The relevant portions of "Headlee" are Article IX, Sections 25 and 31:

> Sec. 25. Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval....
> ...
> Sec. 31. Units of local government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of local government voting thereon....

Other provisions of the Constitution place local government taxes under limits established by charter or general law, and require any law authorizing a tax to distinctly state the tax.[6]

C. Recycling "Fees"

The practice of imposing "mandatory user fees" has been most commonly applied to recycling programs, particularly in the suburban Detroit area, in recent years. The cities of Rochester Hills, Novi, Wixom, Farmington, Farmington Hills, Milford Village, Bloomfield Township, Shelby Township, and Redford Township are examples of local units which have explored this route just since 1991. Shelby and Oxford Townships, faced with opposition from residents, have backed off their "no vote required" claim. Other communities, such as Novi, have reconsidered their initial intentions as well.

The argument that governments make on their behalf is that these "fees" are not taxes simply because they fund a specific activity or function that is beneficial to the public. The Commission does not disagree that many such activities are beneficial to the public, and applauds the use of true user fees to finance certain public services. However, the proliferation of taxes under the guise of user fees requires action by the State before the Constitutional voter-approval requirement for new local taxes becomes effectively meaningless.

These "user fees" are typically expressed as a specific dollar amount per household. As *The Detroit News* editorialized in September 1991, "Those who refuse or neglect to pay have the fee tacked onto their property taxes." Typically, local ordinances creating the "fees" require unpaid "fees" to become a tax lien on the property, and they then appear on the next property tax bill.

---

[6] Article IX section 6, Article IV section 32, Article VII sections 21, 22.

In addition, they are assessed regardless of whether the property owner actually uses the service provided, and have no relationship to usage. A vacant home and a home generating mounds of recyclables both pay the same "fee." A homeowner wishing to use another service, or not use the service at all, has no option.

Furthermore, the money collected from these "user fees" is often not segregated from other general funds, and is sometimes used for things other than the service they were originally "attached" to. In some instances the taxpayer pays more than the costs of that particular service, allowing the local unit of government to spend the excess on some other activity.

The danger to the taxpayer of this burgeoning phenomenon is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property. However, it escapes the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers.

D. Emergency Telephone "Charges"

The attractiveness of the "mandatory user fee" has led to abuse in other areas. The Emergency Telephone Service Enabling Act, 1986 PA 32 (MCL 484.1102) allows a "public agency" to impose and collect "certain charges" to defray the costs of emergency "911" telephone systems. These "charges" are a levy on flat-rate telephone service of up to 5%. The "charge" is thus indistinguishable from a tax levied on flat-rate telephone services.

The law goes on to provide that a county with a population less than a half-million may levy a "charge" of up to 16% on flat-rate telephone service, "or assess a millage or a combination of the 2 to cover emergency telephone operating costs."[7] However, this higher rate requires a ballot question placed before the voters, which must approve the levy and state the specific manner in which the money collected will be distributed. An affirmative vote "shall be considered an amendment to the 9-1-1 service plan ..." and requires the following statement on the bill:

> "This amount is for your 9-1-1 service which has been approved by the voters on (DATE OF VOTER APPROVAL). This is not a charge assessed by your telephone carrier...."

Thus, the Act itself admits that the "charge" is a tax, since it:

- Is not levied by the telephone company;
- Is a mandatory charge;
- Has no relationship with use of the service; and
- Is interchangeable with a property tax, which requires voter approval.

[7] Section 401 (MCL 484.1401).

Emergency telephone service is comparable to emergency ambulance service, in that both are services that provide a small ongoing benefit to the general community, but a large benefit to the few individuals called upon to use them. Thus, there are two obvious financing methods: taxes levied on the whole community, or a user fee paid only by the users. The Attorney General, in an opinion issued on ambulance charges, came to exactly this conclusion. In 1980 OAG 506, he concluded that a city could finance an ambulance service either through "fees for services" or through voter-approved taxes. Notably, he added that the taxes must be approved by the voters even though they were termed "special assessments" in the enabling statute.

E. "User Fees" and "Taxes" Distinguished

There are two major distinctions between "user fees" and "taxes":

1. Payment of a tax is compulsory by law; whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all.[8]

2. Revenue from a tax can be used to pay for any function of the government; revenue from a user fee must pay only for the costs of the service.[9]

There is no distinction between taxes and user fees based on the benefits of the service. All government services benefit somebody, and virtually all have been defended as benefiting society as a whole. The debate over which benefits are worth the sacrifice of higher taxes is an essential part of our democratic society. The connection between benefits and the payment is generally tighter for those services purchased by true user fees, since the user decides each time whether the benefits are worth the fee.

---

[8] Fines levied under law for violations of laws can be considered "user fees" under this definition, since the violator chose to behave in a way that violated the law, and was not compelled to do so. A simple example is a parking fine, imposed because someone chose to "use" the parking space knowing that he or she might have to pay a "fee" (fine) for doing so.

[9] This principle was used by the Michigan Supreme Court in *Merrelli v. St. Clair Shores* (355 Mich 583, 1959) in declaring invalid a license fee that raised revenue far beyond the costs of providing the service:

> In short, we have considered 2 sources of municipal funds, each having inherent limitations resulting therefrom. One involves an exercise of the municipal power of taxation. Its purpose is to raise money. The other is an exercise of the police power of the community. Its purpose is the protection of the public health, safety, and welfare. True, certain moneys may be obtained in connection therewith, but such moneys are incidental to the accomplishment of the primary purpose of guarding the public. The differences between the two were well expressed in *Vernor v Secretary of State,* 179 Mich 157, 167-170 (Ann Cas 1915D, 128), involving the validity of an automobile licensing fee:
>
> "To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue....
>
> "Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure (Citing cases.)"
>
> ...
>
> "In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of proportion to the expense involved, it will be declared a tax."

In reviewing the "mandatory user fees" charged for emergency telephone service and for recycling, it is clear that they both fail one or both of these tests, and are actually taxes.

In the course of its investigation, the Commission was supplied with a number of papers covering Michigan court decisions that have distinguished a "tax" from other types of governmental charges. These have been helpful, but the Commission does not believe that they provide enough case law to prevent continued abuses without lengthy and expensive litigation.

The Commission also received examples of "special assessments" being used to tax residents to provide public services. While the use and abuse of special assessments are discussed elsewhere in this report, the Commission joins with the Attorney General of this state and our Supreme Court in finding that mandatory government exactions on property, unless they fund a physical improvement proportionately benefiting the property, are in fact taxes.[10]

Findings and Recommendations

The Commission finds that any charge, fee, excise, or other monetary demand imposed under authority of statute, charter, regulation or ordinance by a unit of local government, including any authority, is a "tax" under the provisions of the "Headlee" amendment, unless it is either a:

1. Special assessment; or a

2. Fee for service ("user fee").

A "special assessment" is a payment for a physical improvement yielding a proportionate increase in the value of property, in which the revenue from the special assessments are used only for the costs of the improvement.

A "fee for service" or "user fee" is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are used only for the service provided. Examples include municipal sewer charges, lottery tickets, park entry fees, parking tickets, per-bag charges for garbage pick-up, court fees, and license and permit fees. Fines levied for violations of laws are user fees, since the violator chose to behave in a manner that could result in a fine.

---

[10] Opinion of the Attorney General number 506 of 1980. The Michigan Supreme Court visited the topic of special assessments in *Dixon Road Group v City of Novi* 426 Mich 390, 395 NW2d 211 (Nov.1986), holding invalid a "special assessment" that cost the property owner more than twice the benefit derived. The court, citing a long line of cases, held that special assessments must be supported by a showing of an increase in the market value of the property, and that the special assessment must be proportional to the benefit derived from it. In *Kadzban v City of Grandville* 442 Mich 495 (June 1993) the Court again held that special assessments cannot be used to fund general government expenditures: "In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general government purposes.... In other words, a special assessment can be seen as renumerative; it is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area. *Kuick v Grand Rapids,* 200 Mich 582, 588; 166 NW 979 (1918); see also *Knott* [*v City of Flint*, 363 Mich 483, 497; 109 NW2d 908 (1961)]."

The Commission recommends that the legislature similarly define in statute "tax," "special assessment," and "user fee" to prevent further abuses of sections 25 and 31 of the amendment. The statute should impose the burden of proving that any new charge is not a tax on the local unit of government.

The Commission also recommends that the legislature place a finding in any legislation authorizing the state or a political subdivision of the state to raise revenue whether such revenue is either a "state" or "local" tax, and if not a tax, a "user fee" or "special assessment."

The Commission also recommends the legislature require uniform accounting for revenue collected by user fees, requiring annual statements and segregated accounts for revenue above a certain rate, and amend the General Property Tax Act to prohibit the use of property tax rolls to collect user fees. The Commission further recommends that the legislature investigate whether an annual hearing, like a "Truth in Taxation" hearing, be required to approve "user fees" which raise more than a minimum amount of annual revenue.

The Commission specifically identifies three unconstitutional abuses of section 31: "mandatory user fees" levied on property to fund local government recycling services; "charges" levied on telephone service under 1986 PA 32 to fund emergency telephone systems; and "special assessments" which fund operating expenditures of local units of government.

F. "Headlee 'Rollups'"

The amendment is clear that the maximum authorized rate must be reduced when assessments on existing property increase faster than the inflation rate. What about in years in which this doesn't happen? Can this "maximum authorized rate" then be increased back to the original authorization, without the voter approval otherwise required by section 31? Section 34d of the General Property Tax Act (MCL 211.34d) caused this to happen, by establishing a "Millage Reduction Fraction" (MRF) applied to the previous year's maximum authorized rate. This is the ratio between assessment growth and the growth in the price level, adjusted to exclude new construction. In years in which assessment growth lags the inflation rate, this Millage "Reduction" Fraction could exceed 1, and therefore increased the "maximum" authorized millage rate.

The amendment requires voter approval for increases in the maximum authorized rate. "Voter approval" can only be given to what the voters actually know they are approving at the ballot box. In recent years, many school districts began asking voters to approve "renewals" of millage rates that were actually much higher than the current maximum authorized rate. This practice caused a voter action to "renew" an expiring millage to both renew the old millage and authorize additional millage. Section 34(d) also allowed confusing ballot questions citing the "cumulative millage reduction fraction." It is doubtful that one out of a thousand voters know what a "cumulative millage reduction fraction" is, and such a question should not be allowed to obtain voter approval.

Both Headlee "rollups" and confusing millage ballot questions were prohibited by 1993 PA 145 (SB 1), which was signed by the Governor on August 19, 1993.

Findings and Recommendations

The Commission finds that the voters, in adopting the "Headlee" amendment, clearly desired to limit property taxes, permanently reduce that limit when assessments on existing property grow faster than the rate of inflation, and require voter approval for any increases above that limit. The allowance of a non-voted "rollup" in the "maximum authorized rate" of property taxation is contrary to the constitution, and section 34d of the General Property Tax Act should prohibit any increase in the maximum authorized rate without a vote of the people. In addition, any ballot question requesting "voter approval" of taxes under the Headlee amendment must be clear about what taxes are actually being authorized. A "renewal" question cannot authorize an increase above the previous maximum authorized rate, as reduced by the Headlee amendment.

The Commission applauds the sections of 1993 PA 145 that prohibit Headlee "rollups" and misleading property tax ballot questions.

Rollbacks by Parcel, Class, or Jurisdiction

The Commission was also charged with investigating assessing practices and the current system of calculating "Headlee rollbacks" on the total value of property in a jurisdiction, rather than the value of each class or each parcel.

Findings and Recommendations

The Commission finds that the "Headlee" amendment at Article IX section 31, along with Article IX section 6, requires uniform property taxation and a system of equalization to accomplish this. Neither a separate "rollback" of millage rates by class--which would lead to a different millage rate for each class--or a limit on assessment changes for individual parcels is consistent with the constitutional requirement of uniform property taxation. The current practice of "rolling back" millage rates based on the total increase in assessed valuation for all classes and parcels of property within a jurisdiction is consistent with the Constitution. The treatment of personal property is discussed more fully below.

Personal Property and the "Headlee Rollback"

The calculation of the "Headlee rollback" specified in section 31 excludes new construction from the increase in SEV weighed against the inflation rate. If SEV excluding that new construction grows faster than the rate of inflation, then the millage rate is rolled back.

"New construction" in the amendment has been implemented in statute as *net* new construction, (additions less losses) recognizing that both additions and deletions take place, and these should not affect the rollback calculation. Should new construction occur, it would likely generate increased demand for government services, so the new SEV should be taxed without a rollback in its first year. Likewise, should property be deleted from the tax rolls, it would likely mean a decrease in government services required, so that deletion should not eliminate or reduce a rollback.

Personal property (computers, machinery, office equipment and furniture) is subject to the same property tax as real property (land and buildings), although residential personal property is excluded. Personal property depreciates quickly, and indeed is designed to be "used up" over a relatively short time period. Hence, personal property creates "losses" that add up to its "additions" in a very short time.

Section 34d of the General Property Tax Act does not take this into account. The addition of personal property comes into the rollback calculation as an "addition," and therefore does not affect the rollback calculation. However, the subsequent depreciation of the property is not considered a "loss," and therefore offsets other increases in SEV on existing real property. This results in higher property tax rates in those areas with significant business personal property, such as Dearborn, Livonia, Farmington Hills, Lansing, and Sterling Heights. A different approach would be to treat personal property consistently in the rollback calculation: when it is newly installed, it is an "addition," and as it depreciates and is subsequently discarded, it is a "loss."

Findings and Recommendations

The Commission finds that section 34(d) of the General Property Tax Act treats personal property "additions" and "losses" (depreciation) differently, with "additions" excluded from the Headlee "rollback" calculation but depreciation included. This method would result in higher property tax rates than if additions and deletions were offset against each other, especially in those areas where a large amount of commercial or industrial property are located.

However, the Commission also finds the Act not inconsistent with the language of Section 31 of the Headlee amendment, which requires only that "new construction" be excluded from the rollback calculation. Either the current formula or a formula offsetting new personal property additions with depreciation of old personal property would be a consistent legislative interpretation of the amendment. The legislature should amend the statute to eliminate ambiguity about the treatment of personal property.

The Rollback Formula

The best-known aspect of the "Headlee" amendment is its requirement that property tax millage rates be "rolled back" when the growth in assessed value, excluding new construction, exceeds the inflation rate. This requirement is stated in one sentence in Article IX section 31 of the Constitution, and implemented in the much longer section 34(d) of the General Property Tax Act [MCL 211.34(d)].

The Commission agreed with those testifying that the formula for rolling back millage rates to comply with the Headlee amendment, especially when combined with the "Truth in Taxation" calculations also required for local units of government, is extremely complex and difficult to understand.

In addition to the rollback formula's complexity, it has also been criticized for not producing the limit on property tax revenue increases required by the Constitution. A letter to the Commission

from Michael Sessa dated July 15, 1993 repeated four aspects of this criticism:[11]

1. The formula uses the wrong inflation rate.

2. The formula allows the millage rate to "roll up" without a vote.

3. The formula improperly commingles real and personal property.

4. The formula produces the wrong result.

The Commission reviewed these criticisms, and found the following:

1. The formula uses the inflation rate specified in the definitions section of the amendment: the Consumer Price Index calculated by the US Department of Labor. This measure, while imperfect as are all price indexes, is as good an indicator as any and fulfills the constitutional requirement.

2. The Commission agrees with the criticism of "rollups," and addresses the issue specifically elsewhere in this report. Much of the "illegal" tax increase in the Sessa example appears to result from "rollups." This has been eliminated by PA 145 of 1993.

3. The commingling of real (land and structures) and personal (machines, equipment, and furniture) property does create some problems. These are addressed in the previous section.

4. The formula used in Section 34(d) is confusing and not obviously correct. Furthermore, the fact that two different formulas have been used since the passage of the amendment (the current one has been in use since 1983) does lead to questions.

   To answer these questions, the Commission created a simulation model incorporating the formula, and simulated its effect over a wide variety of scenarios. Once the formula was amended to prevent "rollups," which were already eliminated by PA 145, the simulation model showed that tax revenue on existing property did grow at or below the inflation rate, as required by the Constitution. An example from the simulation model is attached (Exhibit 8).[12]

---

[11] Mr. Sessa's letter also criticized the use of a new assessors' manual, claiming it was a local mandate not reimbursed by the state as required by Article IX section 29, and that it inflated SEV and therefore raised property taxes without a vote. The first issue is discussed under section 29. On the latter, the Commission did not dispute that new assessing procedures could cause jumps or drops in SEV. However, any such increase in the assessed valuation of existing property would cause a corresponding drop in the millage rate, under the "rollback" provisions of section 31. This protects the community against an overall increase in property taxes due only to new assessing procedures. The Commission recognizes, however, that an individual property owner whose assessment changed suddenly would still be forced into the appeals process. Although the State Tax Tribunal has been reducing its backlog in the past year, the appeals process for an individual property owner remains lengthy, expensive, and unlikely to produce quick justice.

[12] The complicated aspect of the formula is its treatment of net new construction. The Constitution clearly limits the tax revenue growth on property "excluding new construction," thus allowing for tax revenue to grow without limitation to account for new construction. The statutory implementation properly includes both additions and deletions in this equation, fulfilling the spirit of the Constitution. For further information on the section 31

Findings and Recommendations

> The Commission examined in detail the property tax "rollback" formula, as implemented in the General Property Tax Act. It found the formula uses the proper inflation rate, and properly limits the increase in property tax revenue to that accounted for by inflation plus new construction.

III. Taxes, Special Assessments, and Judgment Levies

Section 31 of Article 9 provides, to the extent here relevant, as follows:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon....

The above provision prohibits units of local government from levying taxes not authorized by law or charter when the provision took effect or from increasing the rate of an existing tax above that then authorized without voter approval. This section examines the extent to which court ordered judgment levies and ad valorem special assessments satisfy the requirements of Section 31.

A. Judgment Levies

Public Act 236 of 1961, the Revised Judicature Act of 1961, authorizes a court to order the levy of ad valorem property taxes to satisfy a money judgment entered against enumerated types of municipalities. The issuance of judgment bonds is also authorized. Creditors have availed themselves of Act 236 on numerous occasions. For example:

- In June 1984, the Wayne County circuit court ordered the city of Hamtramck to impose a one-year judgment levy of 9.6 mills to pay a police and firefighter arbitration award.

- In August 1984, the Berrien County circuit court ordered the city of Benton Harbor to impose a judgment levy each year for the next 30 years to finance a $2.6 million unfunded accrued liability in its firefighter and police pension fund.

In both of the above examples, and others not cited, taxes were levied without a vote of the people. Arguably, voter approval was not required because those sections of Act 236 which authorize judgment levies and judgment bonds predate Section 31 of Article 9. Section 31 does not require that a tax actually had to be levied on the date that the Section became effective. *Bailey v Muskegon County Board of Commissioners,* (122 Mich App 808; 1983). Rather, it requires only that a unit of local government be authorized to levy the tax on the date that Section 31 was ratified by voters.

---

simulation model, contact Commission member Patrick L. Anderson.

Relationship to Property Tax Limitations

The more pressing public policy problem raised by judgment levies and judgment bonds is that the taxes to pay them generally are levied in excess of existing property tax limitations. Section 6 of Article 9 of the state Constitution imposes upon nonchartered counties, nonchartered townships, and school districts an aggregate limitation of 15 or 18 mills for operating purposes. These limitations may be increased by voters up to 50 mills for up to 20 years. Section 6 of Article 9 also requires that tax limitations for operating millage levied by charter units of government be provided by charter or by general law. Furthermore, the home rule provisions of the state Constitution require that the general laws under which charter units may incorporate limit the power to tax, to borrow money, and to contract debt. These latter provisions were intended to ensure that municipal taxing authority be subject to voter approval through the charter ratification and amendment process.

It should be noted that nothing in the Revised Judicature Act of 1961 *requires* that taxes ordered to satisfy a judgment be imposed outside existing tax limitations. Rather, the practice of issuing judgment levies outside of existing limitations results from the practical reality that the parties to the litigation generally have no interest in having such limitations enforced. In the typical judgment levy case, the defendant is a unit of government whose officials have failed to pay a valid obligation, because such payment might have required difficult budgetary choices which those officials were unwilling to make. Furthermore, the plaintiff often has close ties to the unit of government being sued, such as an employee pension board or employee union, and, as such, might be adversely affected if the unit of government had to pay the judgment from within existing taxing authority. Given such circumstances, neither party can be relied upon to vindicate the public interest with respect to tax limitations.

Findings and Recommendations

The Commission recommends that the property tax limitations established under the Constitution and general law should be accorded proper respect by amending the Revised Judicature Act of 1961 to require that a court issuing a judgment levy direct the unit of local government to pay it by setting aside a sum sufficient from the next regular property tax levy, or by issuing limited tax obligation bonds. In either case, the judgment would be paid from within existing taxing authority granted by voters. Such an amendment would convert the offending provisions of the Act from a law improperly granting the courts independent taxing authority into a law granting the courts only the authority to garnish a portion of the next property tax levy of the unit of local government.

B. Ad Valorem Special Assessments

Another issue addressed by the Commission is whether ad valorem special assessments, which are used extensively by units of local government to finance a variety of programs, violate the requirement of voter approval in Section 31 of Article 9 of the state Constitution.

Distinction Between Special Assessments and General Property Taxes

The features which distinguish general property taxes from traditional special assessments are several, and significant.

First, general property taxes are levied upon both real and tangible personal property not otherwise exempted by law, while traditional special assessments are levied only upon land and premises. Real property which may be exempted from general property taxation is not exempt from special assessments unless the statute authorizing the special assessment so provides.

Second, general property taxes are levied throughout an entire assessing jurisdiction to defray the general costs of government, while traditional special assessments are levied only within a special assessment district, comprised of the land and premises specially benefited by the public improvements being financed. Such public improvements have traditionally been physical in nature, such as streets and sewers, for example.[13]

Third, general property taxes are levied upon an ad valorem basis -- according to the value of the property involved -- while traditional special assessments are levied upon the basis of front footage or land area. For example, consider two parcels of property which abut a sidewalk, the one parcel by 50 front feet and the other by 100 front feet. Under a traditional special assessment, the owner of the latter parcel would be assessed an amount equal to twice that assessed the former, but in neither case would the value of the parcel be relevant.

Fourth, and most important, general property taxes are subject to numerous restrictions contained in Article IX of the state Constitution. The restrictions include: the uniformity requirement in Section 3; the millage limitations and the requirement of voter approval to increase the rate and duration thereof in Section 6; and the requirements of voter approval and millage rate roll backs in Section 31. In addition, general property taxes are subject to statutory requirements, such as truth in assessment and truth in taxation. By contrast, traditional special assessments are not subject to the constitutional restrictions noted, *Graham v City of Saginaw,* (317 Mich 427; 1947), nor to the statutory requirements noted.

The rationale underlying the use of traditional special assessment was simple: it was not considered appropriate to use the general revenues of a unit of local government to finance capital improvements that did not benefit the entire community. Rather, it was considered more appropriate to impose an assessment to finance such improvements and to limit its imposition to that real property which received a corresponding and special benefit.

[13] As discussed above in the section on "user fees" and taxes, the Supreme Court has recently reiterated this distinction between taxes--which fund general government expenditures--and special assessments, which must be justified by an improvement in the specific property being assessed which increases its value.

The Nature of the Problem

The state Legislature has enacted, since the 1950s in particular, a patchwork of statutes which authorize units of local government to establish special assessment districts and to impose assessments for a variety of purposes. (See Exhibit 9) Many of these special assessments generally exhibit few of the characteristics of traditional special assessments and are virtually indistinguishable from ad valorem taxes. However, since they are denominated "special assessments" in the statutes that authorize their imposition, they escape the restrictions that apply to ad valorem property taxes, such as the voter-approval requirement.[14]

For example, the Legislature has authorized townships and villages to finance police and fire protection, emergency medical services, refuse collection, and even library services by establishing special assessment districts. None of these services confer special benefit exclusively upon land and premises--as opposed to personal property--and in the majority of cases, the special assessment districts are comprised of the entire geographic area of the township or village. Such a jurisdiction-wide approach ignores the distinction between special benefits conferred upon property assessed under a traditional special assessment and services provided to the general public and financed from general ad valorem property taxes of the unit of local government. Furthermore, the vast majority of special assessments levied for operation purposes are imposed upon an ad valorem basis and not upon the basis of front footage or land area.

In reviewing a statute establishing a "special assessment" for emergency ambulance service, the Attorney General in 1980 OAG 506 concluded that a city could finance an ambulance service either through "fees for services" or through voter-approved taxes. The Opinion further concludes that should the municipality decide to levy a uniform tax under the statute to finance the service, it must submit it to voter approval as any other local tax, even though the statute authorized a "special assessment." The Commission concurs with the Attorney General in recommending that only true special assessments be excluded from the Constitutional requirements for local government taxes, and recommends that "special assessments" indistinguishable from taxes be subject to all Constitutional requirements for local government taxes.

[14] Special assessment statutes follow no single pattern with respect to whether voter approval is required to either establish the assessment district or levy the assessment. For example, under Public Act 33 of 1951, the board of supervisors of a township need only submit to voters the question of financing fire protection through special assessment if petitioned by at least ten percent of the affected property owners. Nor do such statutes generally specify a maximum assessment rate or the maximum time period for which it may be imposed.

Findings and Recommendations

The Commission finds that ad valorem "special assessments" levied by local units of government are typically indistinguishable from ad valorem property taxes, but avoid the constitutional and statutory restrictions which apply to general property taxes. Through the subterfuge of nomenclature, the Legislature has in effect accorded some types of units of local government an unfettered revenue-raising authority, in some instances without voter approval.

As with judgment levies, the problems occasioned by ad valorem special assessments are statutory in nature and, thus, can be corrected by statute. The Commission recommends that the Legislature amend each statute that authorizes establishment of a jurisdiction-wide assessment district to finance general government services to require that all ad valorem special assessments be governed by the same restrictions and limitation, both constitutional and statutory, that govern general property taxes.

EXHIBIT 3

2013 WL 2494994
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MEADOWS VALLEY, LLC, a Michigan Limited Liability Company, Plaintiff–Appellee/Cross–Appellant,
v.
VILLAGE OF REESE, a Michigan Municipal Corporation, Defendant–Appellant/Cross–Appellee.

Docket No. 309549.
|
June 11, 2013.

Tuscola Circuit Court; LC No. 09–25554–CZ.

Before: M.J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

Opinion

PER CURIAM.

***1** In this appeal, defendant appeals by right from the opinion and order of the trial court granting plaintiff's motion for summary disposition on the issue of whether defendant's "ready to serve" charge for sewer usage was an impermissible tax imposed in violation of the Michigan Constitution, and the subsequent entry of a judgment in favor of plaintiff. In the cross-appeal, plaintiff appeals the trial court's award of damages in the amount of $8,910.00. We reverse the trial court's grant of summary disposition and vacate the subsequent judgment; this decision renders plaintiff's cross-appeal moot.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts in this case are undisputed. Plaintiff owns and operates a mobile home park located within the boundaries of defendant. Village of Reese Ordinance Number 10 is "an ordinance regulating the use of public and private sewers and drains; the installation and connection of building sewers and the discharge of waters and wastes into the public sewer system...." The dispute in the instant case centers around defendant's imposition of a "ready to serve" charge on plaintiff of $18 per quarter per mobile home unit. The charge is imposed pursuant to Amendment # 10H to the ordinance, which reads in relevant part:

> Rate Schedule—Village of Reese, Michigan Sanitary Sewer System
>
> Customer Classification: Mobile Home Park
>
> ***QUARTERLY SANITARY SEWER CHARGE IN $ = $18.00 + 1.20 MU GAL.*** [1]
>
> **THE CALCULATION FOR A MOBILE HOME PARK SHALL BE CALCULATED QUARTERLY BASED UPON USAGE IN THOUSAND GALLONS. UNITS SHALL BE BASED ON THE WHOLE PARK AND CHARGED AT $18.00 READY TO SERVE (RTS) + $1.20 PER THOUSAND (MU) GALLON AS REPORTED BY THE BLUMFIELD REESE WATER AUTHORITY. WHILE THE $18.00 READY TO SERVE CHARGE SHALL BE BASED ON THE TOTAL NUMBER OF LOTS IN THE MOBILE HOME PARK.**

It is undisputed that defendant charged the fee for all sites connected to the sewer system, even if they are presently unoccupied. In August of 2009, plaintiff filed a complaint seeking declaratory and injunctive relief, as well as damages, against defendant. Relative to this appeal, plaintiff alleged that the "ready to serve" charge was a disguised tax in violation of the Headlee Amendment, Const 1963, art 9, § 31.

Following discovery, the parties filed cross-motions for partial summary disposition on the issue of plaintiff's challenge to the "ready to serve" charge. The trial court decided the motions without oral argument, granting plaintiff's motion for partial summary disposition in an opinion and order dated March 2, 2011. The opinion stated in relevant part:

> In considering the pleadings in the light most favorable to the Defendant this Court concludes that Defendant's claims are clearly unenforceable as a matter of law. Plaintiff's motion for summary

> disposition should be granted. This Court finds the Defendant's "ready to serve" charge pursuant to the Village of Reese, Sewer Ordinance No. 10, is a tax violative of the Headlee Amendment to the Michigan Constitution. The "ready to serve" charge is not a voluntary payment made for measurable services because every one of the Plaintiff's 126 lots of the Park are mandatorily charged despite the number of unoccupied. Moreover, the revenue collected from the "ready to serve" charge is not used for the operation and maintenance of the Plaintiff's private sewer lines, but rather for the discharge from Plaintiff's entire Park to the Defendant's public sewer system.

***2** The trial court ordered that judgment may enter in favor of plaintiff for $8,910.00. On March 26, 2012, a judgment was entered by the trial court closing the case. This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

Whether a "service charge ... is a 'tax' or a 'user fee' is a question of law that this Court reviews de novo." *Bolt v. City of Lansing,* 459 Mich. 152, 158; 587 NW2d 264 (1998). This Court also reviews a trial court's grant of a motion for summary disposition de novo. *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). "This Court presumes that ordinances are constitutional, and the party challenging the validity of the ordinance has the burden of proving a constitutional violation." *People v. Rapp,* 492 Mich. 67, 72; 821 NW2d 452 (2012), citing *Cady v. Detroit,* 289 Mich. 499, 505; 286 NW 805 (1939).

III. ANALYSIS

The Headlee Amendment, Const 1963, art 9, § 31, provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

It is undisputed in the instant case that if the "ready to serve" charge is a tax, it "unquestionably violates the Headlee Amendment," as Ordinance 10 was not adopted in conformance with Amendment. See *Bolt,* 459 Mich. at 158. On the other hand, "if the charge is a user fee ... the charge is not affected by the Headlee Amendment." *Id.* at 159.

In *Bolt,* our Supreme Court faced a constitutional challenge to a City of Lansing ordinance that provided for a "storm water service charge" imposed on all parcels of real property located within the city. *Id.* at 155. The service charge was adopted to help defray the expenses involved in the construction and administration of a new combined sewer overflow system for the system. *Id.* The service charge was assessed based on a formula that attempted to calculate each parcel's storm runoff, although residential parcels of less than two acres were charged a flat fee. *Id.* The service charge was not voluntary and the ordinance provided for escalating penalties for nonpayment, as well as a system for administrative appeals of the rate assessments. *Id.* at 157.

The Court began by noting that "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. Adding to the difficulty, "the Headlee Amendment fails to define either the term 'tax' or 'fee[.]' " The Court then noted that its interpretation of the amendment was guided by the "rule of common understanding," which has been stated as follows:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or

> abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed." [*Bolt,* 459 Mich. at 152, quoting *Traverse School Dist v. Atty Gen,* 384 Mich. 390, 405; 185 NW2d 9 (1971), quoting Cooley's Const Lim 81 (emphasis in original).]

***3** With this guiding principal in mind, the Court noted that "generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax' on the other hand, is designed to raise revenue." *Id.* at 161 (citations omitted). The Court then identified

> three primary criteria to be considered when distinguishing between a fee and a tax. The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service.... In *Ripperger,* this Court articulated a third criterion: voluntariness. [*Id.* at 161–162 (citations omitted).]

Having articulated these criteria, the Court found that the purpose of the fee, to a large extent, was "an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity." *Id.* at 163. Therefore, the ordinance failed "both the first and second criteria." *Id.* The Court also found that the "charges imposed did not correspond to the benefits conferred" because seventy-five percent of the property owners in the city were already served by a storm and sewer system, and "[u]nder the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction." *Id.* at 165. Additionally, the charge applied to all property owners, "rather than only to those who actually benefit." *Id.* The Court concluded that "the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id.* at 166.

"Buttress[ing]" the Court's finding was "the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the city, not only property owners." *Id.* at 166. Additionally, the ordinance failed to significantly regulate surface-water runoff in support of the stated goal of the ordinance. *Id.* at 166–167. Finally, the Court noted that the ordinance "lacks any element of volition." *Id.* at 167.

However, the Court in *Bolt* made clear that it was *not* foreclosing the possibility that a city could implement a valid storm water or sewer charge without violating the Headlee Amendment:

> A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. [*Id.* at 164–165 (citations omitted).]

***4** Shortly after *Bolt,* this Court stated that "these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v. Kochville Twp,* 236 Mich.App 141, 151; 599 NW2d 793 (1999).

More recently, this Court in *Wheeler v. Charter Twp of Shelby,* 265 Mich.App 657; 697 NW2d 180 (2005), determined that an ordinance that implemented a charge for solid waste disposal was not a tax in violation of the Headlee Amendment. The ordinance in question was promulgated for the purposes of collection and disposal of solid waste, thereby satisfying the first *Bolt* criterion by "clearly serv[ing] regulatory purposes, i.e., to ensure

the efficient removal of waste products and to protect the public health .” *Id.* at 665.

The collection and disposal charge authorized by the ordinance also satisfied the second criterion because “the waste hauler bills customers directly and receives all revenues generated by the fee to offset the costs of collection and disposal. In this regard, the charge bears the classic characteristics of a user fee.” *Id.* With respect to the second *Bolt* criterion, this Court noted that “[t]his Court presumes the amount of the fee to be reasonable, ‘unless the contrary appears on the face of the law itself or is established by proper evidence.’ “ *Id.* at 666, quoting *Graham,* 236 Mich.App at 154–155. This Court further rejected plaintiff's claim that the fee was disproportional to the benefit bestowed because each resident was charged a flat fee rather than an amount based on the amount of solid waste generated, noting that the plaintiff offered “no evidence of any alternative means of more accurately establishing the cost of collection and disposal for each residence.” *Id.*

This Court in *Wheeler* did note that the ordinance at issue failed the third *Bolt* criterion, as it was not voluntary.

> Nevertheless the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax. The first two criteria so clearly demonstrate the collection and disposal charge is a permissible user fee and not an impermissible tax; the decision of the township to place its policing authority behind the enforcement of the ordinance does not render the use fee a tax for purposes of the Headlee Amendment. [*Id.* at 666–667.]

Here, we conclude that the ordinance at issue, like the ordinance in *Wheeler,* fulfills the first two *Bolt* criteria. First, the ordinance at issue is an ordinance “regulating the use of public and private sewers and drains; the installation and connection of building sewers, and the discharge of waters and wastes into the public sewer system.” Thus, rather than having the purpose of raising revenue for a large capital improvement, or avoiding the payment of environmental penalties, as in *Bolt,* we conclude that the ordinance's purpose is regulatory, i.e., the regulation of the amount of sewage introduced into the public sewer system, for the purposes of health and safety. See *Wheeler,* 265 Mich.App at 665; see also *Graham,* 236 Mich.App at 152 (“[b]y exacting [a] fee for connection to the water system, the purpose is clearly to regulate and control the use and distribution of water provided by the regulatory system.”)

***5** Additionally, this Court has noted that “the inquiry into the first two factors is closely intertwined.” *Mapleview Estates, Inc v. City of Brown City,* 258 Mich.App 412, 415; 671 NW2d 572 (2003). This is a matter of simple logic; if the fees charged are in proportion to the actual costs of the services provided, then they “cannot be regarded as a means of producing revenue” and therefore support the conclusion that the purpose of the charge is regulatory rather than revenue-raising. *Id.* at 415–416. Thus, in *Wheeler,* this Court found the second *Bolt* factor to be satisfied when all revenues generated by the fee were used to offset the costs of collection and disposal. 265 Mich. at 665. Similarly, and on all fours with the instant case, the defendant in *Mapleview Estates* presented evidence that the fees charged for connecting a site to the water and sewer systems were actually “less than the actual costs of providing the services.” 258 Mich.App at 415.

Here, defendant presented the trial court with financial statements from March 31, 2003 to March 31, 2010. Although the 2003 and 2004 statements reference an “Enterprise Fund” without making specific reference to the “Sewer Fund,” the later years' statements are entitled “Major Enterprise Fund/Sewer Fund.” In any case, the financial statements show that the operating expenses exceeded the charges for services every year, and that the fund thus sustained a loss of both operating income and net income each year. Additionally, although plaintiff endeavors to characterize the “ready to serve” charge as a flat fee, it appears from the face of the ordinance that the fee is composed of a minimum charge of 18 dollars plus an amount based on usage. Plaintiff did not present the trial court with evidence “of any alternative means of more accurately establishing the cost of collection and disposal for each residence.” See *Wheeler,* 265 Mich.App at 666. Therefore, we presume, as in *Mapleview Estates* and *Wheeler,* that the fee charged in the instant case is regulatory and proportional to the service rendered.

The trial court stated that "the revenue collected from the 'ready to serve' charge is not used for the operation and maintenance of the Plaintiff's private sewer lines, but rather for the discharge from Plaintiff's entire Park to the defendant's public sewer system." While a true statement, we do not see how that fact supports the conclusion that the ordinance fails the first two *Bolt* criteria. In *Bolt,* our Supreme Court found the majority of property owners in the city received no particular benefit in exchange for the charge, because they were already served by another storm and sewer system for which they had paid. 459 Mich. at 165. Here, as in *Wheeler* and *Mapleview Estates,* plaintiff receives the benefit of being able to attach its private sewer lines to, and to dispose its waste into, a public system. *Wheeler,* 265 Mich.App at 665; 258 Mich.App at 415–416. This is both a "benefit [that] is not generally shared by other members of society" and, as stated above, a fee that "reflects the actual costs of use." *Bolt,* 459 Mich. at 164–165. We therefore find that the trial court erred in determining that the "ready to serve" charge did not satisfy the first two *Bolt* criteria.

***6** We agree that the charge is not voluntary, to the extent that one may not own property in the Village of Reese and not connect to the public sewer system. The ordinance requires all owners of "houses, buildings, or properties used for human occupancy ..." to connect to the public sewer system. There is "[a]bsolutely no element of volition" involved. *Wheeler,* 265 Mich.App at 666. However, we do not find this factor dispositive in light of the clear satisfaction of the first two *Bolt* factors. Additionally, although plaintiff makes much of the fact that currently unoccupied units are charged the minimum fee, this is no different than an unoccupied house that is not yet sold or an empty apartment that is not yet rented. The instant case is not analogous to *Bolt,* 459 Mich. at 165, where all property owners were required to fund a large property improvement regardless of whether they would receive a benefit from that improvement (other than the generalized benefit to society). Rather, plaintiff receives the benefit of use of the public sewer system, notwithstanding that some of the units within its park are unoccupied.

We therefore conclude that the trial court erred in determining that the "ready to serve" charge violated the Headlee Amendment. Because we reverse the trial court's grant of summary disposition and vacate the judgment entered upon it, we decline to address plaintiff's challenge to the amount of damages awarded as moot. See *City of Warren v. City of Detroit,* 261 Mich.App 165, 166 n. 1; 680 NW2d 57 (2004).

Reversed and remanded for entry of summary disposition for defendant. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2013 WL 2494994

Footnotes

1 "MU Gal" refers to "the number of thousand gallon units of potable water used as reported on the water authority billing statement for the previous winter quarter."

EXHIBIT 4

2001 WL 1011889
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

WATERCHASE ASSOCIATES, L.L.C., Edward Rose Associates, Inc., Ramblewood, Ltd., Real Estate Group, Peppercorn Apartments, L.L.C., Oakhill Prdo Apartments, L.L.C., Prairie Creek Apartments, L.L.C., Cambridge Partners, Inc., and Richard Bolkema and Harold Ploeg, d/b/a Parkview Group, Plaintiffs-Appellants,
v.
CITY OF WYOMING, Defendant-Appellee.

No. 225209.
|
Sept. 4, 2001.

Before: FITZGERALD, P.J., and GAGE and C.H. MIEL, * JJ.

Opinion

PER CURIAM.

***1** Plaintiffs appeal as of right from the trial court's order granting in part and denying in part their motion for summary disposition. We affirm.

The Michigan Housing Act, M.C.L. § 125.401 *et seq.,* requires municipalities with populations exceeding 10,000 to implement an inspection program for rental properties located within their boundaries. MCL 125.526(1). A municipality may charge a fee for such inspections. The fee cannot exceed the actual cost of the inspections. MCL 125.526(12). Defendant adopted an ordinance and resolutions establishing an inspection schedule and a schedule of fees payable by rental property owners. The fees did not correspond to the number of units actually inspected in each building or complex.

Plaintiffs, owners of rental properties within defendant's boundaries, filed suit alleging that the registration fees violated both M.C.L. § 125.526(12), and the Headlee Amendment, Const 1963, art 9, § 31. The Headlee Amendment provides in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no issue of fact existed as to whether the inspection fees violated M.C.L. § 125.526(12) because they exceeded the actual costs of providing the inspections, and Const 1963, art 9, § 31 because they were taxes imposed or sought to be imposed without prior voter approval. The trial court granted in part and denied in part plaintiffs' motion. The court determined that the fees violated M.C.L. § 125.526(12), and enjoined implementation of the fees on that basis. The court concluded plaintiffs' argument regarding Const 1963, art 9, § 31 was moot; however, in order to provide plaintiffs with a complete ruling, presumed that the fee was not a tax.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v. Olde Financial Corp,* 225 Mich.App 601, 605; 572 NW2d 679 (1997).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt v. Lansing,* 459 Mich. 152, 161-169; 587 NW2d 264 (1998). Whether a charge is a fee or a tax is a question of law which we review de novo on appeal. *Id.,* 158.

Plaintiffs argue that the trial court erred by holding that defendant's inspection fees did not violate Const 1963, art 9, § 31. We disagree and affirm the trial court's decision. Defendant's rental property inspection

program is mandated by statute, M.C.L. § 125.526(1), and the imposition of a fee to administer the program is authorized by statute. MCL 125.526(12). The fees were imposed to implement the inspection program only, and were not sufficient to pay all allowable costs, i.e., salaries and other costs solely attributable to the program itself. *Saginaw County v. John Sexton Corp,* 232 Mich.App 202, 211-212; 591 NW2d 52 (1998). The fees were not designed to provide revenue to pay for unrelated costs such as infrastructure, and thus did not fail the first and second criteria of the test for distinguishing a fee from a tax. Cf. *Bolt, supra,* 163. In addition, the fees were not imposed on all property owners within defendant's boundaries, as was the service charge rejected as an unconstitutional tax in *Bolt, supra,* but were imposed only on those parties who chose to own multiple rental units. We conclude that defendant's inspection charge was a valid regulatory fee. Summary disposition was properly granted on this issue.

***2** Affirmed.

All Citations

Not Reported in N.W.2d, 2001 WL 1011889

Footnotes

* Circuit judge, sitting on the Court of Appeals by assignment.

EXHIBIT 5

2004 WL 2875634
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

TOBIN GROUP, LLP, and Gateway Apartments of Grand Blanc, L.L.C., Plaintiffs-Appellants,
v.
GENESEE COUNTY, Defendant-Appellee.

No. 248663.
|
Dec. 14, 2004.

Before: O'CONNELL, P.J., and BANDSTRA and DONOFRIO, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) and (I)(2). The trial court dismissed the complaint because it found that a County Capital Improvement Fee ("CCIF") imposed by defendant Genesee County was not an illegal tax, but a regulatory fee. The county imposed the CCIF on individuals who newly connected to the county's water or sewer system in sewer districts 1, 2, 5, and 6. The CCIF consisted of a $1,000 charge on each unit for each system. We affirm because this case is indistinguishable from *Graham v. Kochville Twp,* 236 Mich.App 141; 599 NW2d 793 (1999).

On appeal, plaintiffs argue that the CCIF is an illegal tax imposed without voter approval, contrary to the Headlee Amendment, Const 1963, art 9, § 31. The facts of this case are essentially undisputed, including the fact that the CCIF was not submitted to the voters for approval. Therefore, if the charge is a tax, it violates the Headlee Amendment. *Bolt v. Lansing,* 459 Mich. 152, 158; 587 NW2d 264 (1998). However, if the charge is determined to be a user fee, it is not subject to voter approval. *Id.* at 159. Whether a charge is a "tax" or a "user fee" is a question of law that we review de novo. *Id.* at 158. Likewise, we review de novo a trial court's decision to grant summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999).

"Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." ' *Bolt, supra* at 161, quoting *Saginaw Co v. John Sexton Corp,* 232 Mich.App 202, 210; 591 NW2d 52 (1998). "A 'tax,' on the other hand, is designed to raise revenue." *Bolt, supra* at 161. Therefore, whether an exaction represents a "tax" or "fee" hinges on whether it funds a benefit for everyone or funds a benefit that exclusively inures to those who must pay. *Id.* "There is no bright-line test for distinguishing a valid user fee from a tax that violates the Headlee Amendment." *Id.* at 160. The Supreme Court has developed three basic criteria to help differentiate between a fee and a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id.* "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id.* at 161-162.

> To be sustained [as a fee], the act ... must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost.... [*Id.* at 162, quoting *Vernor v. Sec of State,* 179 Mich. 157, 167; 146 NW 338 (1914).]

The third criterion is "voluntariness." *Bolt, supra* at 162.

***2** In the present case, property owners of new construction in Genesee County sewer districts 1, 2, 5 and 6, are charged the disputed CCIF, $1,000 per unit for connecting to the county water system and another $1,000 per unit for connecting to the county sewer system. The money raised by the CCIF is used to increase the capacity of the county's water and sewer systems which were being operated at or beyond their capacity. Without an increase in capacity, no new customers could connect to the systems, and all new development would have to stop or, where permitted, construct wells and septic systems.

Unlike *Bolt,* which struck down a storm-water rain charge as a tax, the CCIF in this case is not imposed on customers who are already being served by the existing

water and sewer systems. *Id.* at 165. Only the owners of new construction in the affected districts are charged the CCIF. Connection charges such as the CCIF serve the purpose of regulating and controlling the use and distribution of water provided by the municipal system. See *Graham, supra* at 152. They also "pay for the regulation of a specific part of the community's access to a municipal water supply." *Id.* at 152-153.

Plaintiffs argue that although new users will pay the full cost, existing users of the sewer system will benefit from the increased capacity financed by the CCIF because the possibility of sewage backups will be reduced. As an initial matter, this argument is not relevant to the water CCIF. [1] Regarding the sewer system, new users are the only ones who will directly benefit from the newly added capacity of these systems, notwithstanding any ancillary benefits current users may reap from the expansion. *Graham, supra* at 153. Plaintiffs failed to demonstrate anything more than an incidental benefit to current users, so we are not persuaded that the charge is anything other than a fee. As we noted in *Westlake Transport v. PSC,* 255 Mich.App 589, 613; 662 NW2d 784 (2003), "a regulatory fee can have dual purposes and still maintain its regulatory characterization." Therefore, the purpose of the charge is primarily regulatory. *Graham, supra* at 152-153.

Regarding proportionality, defendant initially calculated the sewer CCIF by determining the actual present cost of adding the necessary capacity, plus debt service, and dividing that by the number of new hookups anticipated. This produced a cost per unit of $988, which defendant rounded up to $1,000. Using similar methods, defendant estimated the cost of water hookups at $1,157 per unit, which defendant rounded down to $1,000. Later, Victor Cooperwasser, whose company is in the business of preparing water, sewer, and stormwater rate studies, applied a calculation method that apportioned to current users the amount of the new system's debt service that they will likely pay in the future. He determined that the buy-in cost for the sewer and water systems was slightly lower than originally calculated: $1,028 for sewer and $955 for water. He therefore concluded that the $1,000 CCIF per system amount was fair and reasonable. We agree.

***3** Plaintiffs have presented no evidence to support their claim that their fair share of the added capacity should be a nominal fee of only $50 to $100. We note that, in *Graham, supra* at 143-145, 154-155, this Court upheld a water connection fee of over $9,000, finding that it was proportionate to the cost of extending the water system into rural areas. Further, the alternative proposed by plaintiffs here (spreading the cost of adding capacity among all users) would likely render the fee illegal under *Bolt,* given that current users would receive very little benefit from the project and, therefore, the cost to them would not be commensurate with the value of the benefit conferred.

Plaintiffs further claim that when calculated according to Cooperwasser's method, the CCIF assessments result in excess revenue of approximately $17 for each new customer. However, plaintiffs fail to demonstrate how this additional money changes our categorization of the charge. "The test is whether the fee is proportional, *not whether it is equal,* to the amount required to support the services it regulates." *Westlake, supra* at 615 (emphasis added). Further, "[a]s long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose." *Id.* at 613; see also *Graham, supra* at 151. Plaintiffs failed to present any evidence to support their speculation that the additional money collected would be used for some other non-regulatory purpose. Likewise, plaintiffs' argument that they are essentially paying for a general infrastructure improvement fails. The improvement benefits only those charged, and plaintiffs failed to present any evidence indicating that the benefit to the public will substantially continue beyond the period established for financing the project. Cf. *Bolt, supra* at 163-164. Therefore, despite the minor discrepancy identified by plaintiffs, the CCIF charges imposed in this case are proportionate to the cost of the benefit provided.

Regarding voluntariness, defendant concedes that property owners building within three hundred feet of a new sewer line will be required to tap into the system. In *Bolt, supra* at 168, the Supreme Court rejected the argument that a rain runoff charge was voluntary because the plaintiffs could avoid the fee by choosing not to build on their property. The Court noted that relinquishing the right to build on one's property was not a legitimate method of controlling the amount of the fee. *Id.* Here, however, the issue is not one of development, but placement of that development. Also, plaintiffs concede that on the whole, they desire the development and primarily dispute its cost. Further, defendant points out that some of these property owners have chosen to apply

for a variance from the tap-in requirement and that about three out of every seven have been granted.

Nevertheless, plaintiffs point to the fact that failure to pay the sewer CCIF could, if unpaid, result in a lien on some of their properties. Plaintiffs note that in *Bolt, supra* at 168, such collection procedures were a factor in the Supreme Court's determination that the rainfall runoff charge was a tax rather than a fee. Nevertheless, it is undisputed that for single-family dwellings and developments of fifty units or less, defendant is requiring that connection charges be paid *before* the connections are made, and that any remaining balance be paid in full upon sale of the property. Thus, in most cases, there will be no unpaid charge or potential lien enforcement as described in *Bolt.* In light of all the facts, the potential availability of a lien to collect an unpaid CCIF does not transform the CCIF into an illegal tax. Even if the sewer CCIF is involuntary for a portion of the affected property owners, "that ... weakness ... [does] not necessarily mandate a finding that the charge at issue is not a fee." *Graham, supra* at 151.

***4** The relevant criteria, considered in their totality, weigh in favor of finding that the CCIF is a fee, not a tax. The only weaknesses to this determination are the fact that new users within three hundred feet of a new sewer line are required to tap into the sewer system. Nevertheless, the three hundred-foot rule affects only some of the individuals who must pay the sewer CCIF. Further, the *Bolt* criteria are to be considered "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." *Graham, supra* at 151. In light of the record as a whole, we conclude that this weakness does not compel the conclusion that the CCIF is an illegal tax rather than a valid fee. We therefore hold that the trial court properly granted summary disposition to defendant.

Plaintiffs further argue that, even if the CCIF is a fee rather than a tax, it is illegal because defendant did not enact an ordinance or resolution authorizing it. We disagree. None of the constitutional provisions cited by plaintiffs require defendant to enact an ordinance or resolution to authorize the CCIF. The trial court applied the County Public Improvement Act ("CPIA"), MCL 46.171 *et seq.,* which independently authorizes defendant to create, maintain, improve, and extend water and sewer systems, including establishing connection fees and other rates. See MCL 46.171, MCL 46.172, and MCL 46.174. Nothing in the CPIA requires that an ordinance or resolution be adopted each time the designated county agency needs to act. Contrary to plaintiffs' arguments, the CPIA empowers the drain commissioner to construct improvements and impose charges to pay for them, including connection fees such as the CCIF, without the county having to enact an enabling ordinance or pass a resolution. MCL 46.173.

Affirmed.

All Citations

Not Reported in N.W.2d, 2004 WL 2875634

Footnotes

1 Nevertheless, defendant provided evidence that existing problems in both systems are being addressed with funds reserved from the rates charged to existing customers.

EXHIBIT 6

2002 WL 483507
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Sheldon FUTERNICK, d/b/a Holiday West Mobile Home Park, Plaintiff-Appellant,
v.
SUMPTER TOWNSHIP, Defendant-Appellee.

No. 221697.
|
March 26, 2002.

Before: TALBOT, P.J., and SMOLENSKI and WILDER, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** This action concerns the validity of defendant township's Resolution 96-11, revising sewer rates. The trial court was presented with and decided three separate motions for summary disposition. As a result of the trial court's ruling on the first motion for summary disposition, plaintiff was precluded from challenging the constitutionality of Resolution 96-11 based on the theory that revenues generated from the rate revision were being used to fund a Phase II sewer. As a result of the trial court's second ruling, defendant's claim that the instant action was barred by a 1994 federal action (involving enforcement of a settlement agreement between the parties relative to the construction of the Phase II sewer) was denied, with prejudice. In its third ruling, the trial court denied plaintiff's motion for summary disposition, granted defendant's motion for summary disposition, and dismissed the case, with prejudice, but preserved an earlier order compelling defendant to produce certain documents. Plaintiff appeals as of right. We affirm.

I

Plaintiff first argues that the trial court erred in holding that Resolution 96-11 was not an illegal tax prohibited by the Headlee Amendment, Const 1963, art 9, § 31. We review the trial court's ruling on this issue de novo to determine whether summary disposition was properly granted to defendant pursuant to MCR 2.116(C)(10). *Maiden v. Rozwood,* 461 Mich. 109, 120-121; 597 NW2d 817 (1999); *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). Our review is limited to the record presented to the trial court. *Admiral Ins Co v. Columbia Casualty Ins Co,* 194 Mich.App 300, 305; 486 NW2d 351 (1992); *Amorello v. Monsanto Corp,* 186 Mich.App 324, 330; 463 NW2d 487 (1990). Also, we must evaluate the motion in light of the substantively admissible evidence actually proffered to the trial court. *Maiden, supra.*

As a threshold matter, we note that plaintiff characterizes Resolution 96-11 as an "ordinance," subject to the same standard of judicial construction as a statute, in support of his position that it establishes a tax, but plaintiff has failed to cite any authority in support of this position. A mere statement of position is insufficient to bring an issue before this Court. *Goolsby v. Detroit,* 419 Mich. 651, 655 n 1; 358 NW2d 856 (1984).

In any event, an ordinance generally has a legislative character and will be construed in the same manner as a statute. *Brandon Charter Twp v. Tippett,* 241 Mich.App 417, 422; 616 NW2d 243 (2000). Taxation and ratemaking are generally viewed as legislative functions. *City of Novi v. Detroit,* 433 Mich. 414, 427; 446 NW2d 118 (1989); *Advisory Opinion on Constitutionality of 1986 PA 281,* 430 Mich. 93, 112; 422 NW2d 186 (1988). The establishment of a rate means the "making of a rule for the future." *Pennwalt Corp v. Public Svc Comm,* 166 Mich.App 1, 8; 420 NW2d 156 (1988), quoting *Prentis v. Atlantic Coast Line Co,* 211 U.S. 210, 226-227; 29 S Ct 67; 53 L Ed 150 (1908). By comparison, a resolution has been defined as the "formal expression of the opinion or will of an official body, adopted by a vote." *Gorney v. Madison Heights,* 211 Mich.App 265, 271; 535 NW2d 263 (1995), quoting Black's Law Dictionary (5th ed). It usually refers to an adoption by motion where the subject matter would not properly constitute a statute. *Id.* at 271. Administrative matters, such as budgetary matters, may generally be accomplished by resolution. See *Detroit v. Detroit United Railway,* 215 Mich. 401; 184 NW 516 (1921).

***2** On its face, Resolution 96-11 purports to be a vote, by motion, of defendant's Board of Trustees on a "resolution" to add one dollar per one thousand gallons of use for "sewer system debt retirement." Although the authority to revise rates is itself found in an ordinance governing defendant's combined water supply and sewer disposal facilities, namely, Ordinance No. 66, we reject plaintiff's assertion that the character of the resolution is itself an ordinance. As a matter of law, we will treat Resolution 96-11 according to its specified character as a resolution. [1]

We also note that the trial court, when making its third summary disposition ruling, granted summary disposition of plaintiff's claim that Resolution 96-11 established a tax, but that part of plaintiff's argument on appeal also implicates the trial court's first summary disposition ruling concerning whether Resolution 96-11 should be construed as establishing a one-dollar debt service charge for a Phase II sewer. Giving due regard to the admission of plaintiff's attorney at the hearing on the first motion for summary disposition that Phase II had not been constructed, we hold that the trial court correctly precluded plaintiff from proceeding on the theory that the revised rate in Resolution 96-11 for "sewer system debt retirement" was for the Phase II sewer.

Examined in the context of the proofs then before the trial court with regard to plaintiff's 1994 federal action concerning defendant's intent to use its landfill royalty revenues to secure bonds for the planned Phase II sewer, we are unpersuaded that the statement in Resolution 96-11 regarding defendant's wishes to construct the Phase II sewer reasonably supports an inference that the one-dollar debt service charge was to be used for Phase II. Indeed, we note that plaintiff's position, advanced throughout the proceedings in this case, was that defendant's landfill royalty revenues were used to fund the existing debt for the Phase I sewer. Although plaintiff claimed an entitlement to have $300,000 applied to the Phase I sewer, § 20 of the ordinance upon which he relied, namely, Ordinance 67, designates the ordinance as a "contract between the Township and the bondholders." Section 11 precludes free use of the system, or "use of the System at less than cost," while § 13 authorizes rate revisions. Although Ordinance 67, § 11, contains a pledge of "annual landfill revenues" for operating costs, the specified sum is an "amount not to exceed $300,000." Construing Ordinance 67 in accordance with its clear and unambiguous language, we reject plaintiff's claim that it binds defendant to annually allocate a full $300,000 of landfill royalty revenues to the Phase I sewer for the benefit of users. *Brandon Charter Twp, supra* at 422. Section 67, § 11, clearly contains only defendant's pledge of an amount not exceeding $300,000 to meet its obligations.

Examined in this context, we must determine if the added one-dollar debt retirement charge in Resolution 96-11 is a "tax" subject to the Headlee Amendment or a valid "user fee" unaffected by the Headlee Amendment. Our determination of this issue is guided by the three primary factors set forth in *Bolt v. Lansing,* 459 Mich. 152; 587 NW2d 264 (1998).

***3** The first factor is that the "user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Bolt, supra* at 161. In light of our determination that the debt retirement charge is for the existing Phase I sewer and our rejection of plaintiff's claim of entitlement to have $300,000 in landfill royalty revenues allocated to the Phase I sewer, we find that the first factor weighs in favor of finding a user fee. The fact that Resolution 96-11 does not specify an ending date for the debt retirement charge does not establish a revenue-raising purpose, given defendant's authority to revise the charge.

The second factor is that "user fees must be proportionate to the necessary costs of the service." *Bolt, supra* at 161-162. In view of the evidence that the debt retirement charge is a use-based charge, as well as plaintiff's failure to argue or otherwise establish factual support for the proposition that revenues generated from the Phase I sewer exceed its costs, independent of any consideration of landfill royalty revenues, we hold that this second factor also weighs in favor of finding a user fee.

The third factor is one of voluntariness. *Bolt, supra* at 162. Ignoring for purposes of our analysis the record evidence that plaintiff wanted to connect to the sewer system, we hold that plaintiff's claim of involuntariness still fails. There is an element of volition because users may refuse, or at least limit, water use (and the corresponding use of the sewer that would dispose of the water). *Id.*

Upon considering all three primary factors set forth in *Bolt, supra,* we hold that the trial court correctly granted summary disposition under MCR 2.116(C)(10). Plaintiff failed to show either a genuine issue of material fact

or demonstrate that he, rather than defendant, should have been granted summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 120-121. As a matter of law, Resolution 96-11 did not establish a tax. Hence, the Headlee Amendment is not applicable.

II

Plaintiff next challenges the trial court's ruling denying summary disposition in his favor and granting summary disposition in favor of defendant regarding the validity of Resolution 96-11 based on various statutory, ordinance, and constitutional grounds.

Addressing first the statutory bases of plaintiff's argument, we note that plaintiff cites M.C.L. § 123.741 in support of his claim of error, but plaintiff has failed to address the trial court's ruling that this statute was not applicable to defendant, a township. Having failed to brief this necessary issue, plaintiff's reliance on M.C.L. § 123.741 provides no basis for declaring Resolution 96-11 invalid. See generally *Roberts & Son Contracting, Inc v North Oakland Development Corp,* 163 Mich.App 109, 113; 413 NW2d 744 (1987) (failure to address a necessary issue precludes appellate relief).

We further find that plaintiff has demonstrated no basis for disturbing the trial court's ruling that § 121 of the Bond Revenue Act, M.C.L. § 141.121, was not violated. We decline to consider plaintiff's claim regarding M.C.L. § 141.122, given plaintiff's failure to show that he challenged the validity of Resolution 96-11 on this basis or that exceptional circumstances now exist to warrant consideration of this statute. Issues raised for the first time on appeal ordinarily are not subject to review. *Booth v Univ of Michigan Bd of Regents,* 444 Mich. 211, 234; 507 NW2d 422 (1993). Further, we are not persuaded that M.C.L. § 141.126 provides any basis for disturbing the trial court's decision to grant summary disposition in favor of defendant.

***4** Turning to the ordinances relied on by plaintiff in his argument, we note as a threshold matter that plaintiff has not established any basis for relief based on the proposition that Resolution 96-11, as applied, violates Ordinance No. 67. As we have previously discussed, Ordinance No. 67 contains only a pledge of landfill royalty revenues in an amount not exceeding $300,000.

With regard to plaintiff's claim that Resolution 96-11 violates Ordinance No. 66, we note that plaintiff cites §§ 3, 7(A)(1) and (8)(B)(1) of Article XI in support of his argument.

Because plaintiff has failed to adequately brief the applicability of § 3, or to show that this issue was presented to the trial court, we conclude that his argument concerning this section is not properly before us. *Booth, supra* at 234; *Goolsby, supra* at 655 n 1. We note that the essence of § 3 is that defendant's Board of Trustees may revise rates and charges, by resolution, "as necessary to ensure sufficiency in meeting operation, maintenance and replacement costs, as well as debt service." It lends no support to plaintiff's position that defendant was bound to use a full $300,000 in landfill royalty revenues for the Phase I sewer.

With regard to plaintiff's claim that Resolution 96-11 was adopted in violation of § 7(A)(1), we note that the trial court's specific ruling regarding this section was that "[i]t is clear to this Court that this section has no application to sewer system debt retirement." Because plaintiff has not addressed the basis for the trial court's ruling, we hold that plaintiff has not demonstrated entitlement to relief. *Roberts & Son Contracting, Inc, supra* at 113. Also, any error in the trial court's unchallenged use of a defective affidavit, when analyzing whether § 7(A)(1) was violated (on the assumption that § 7(A)(1) would apply), was harmless because it was not the dispositive issue.[2] MCR 2.613(A); *Harris v Univ of Michigan Bd of Regents,* 219 Mich.App 679, 693 n 3; 558 NW2d 225 (1996).

With regard to plaintiff's assertion that § 8(B)(1) was violated because Resolution 96-11 did not specify an amortization period, we note that the trial court's specific ruling with regard to § 8(B)(1) was that "[t]he theory was never pled in the first amended complaint. It will not be considered here." Again, plaintiff does not address the basis for the trial court's ruling on this issue and, therefore, plaintiff's claim does not provide a basis for relief. *Roberts & Son Contracting, Inc, supra* at 113.

Turning to the constitutional claims raised by plaintiff on appeal, we note that plaintiff claims that Resolution 96-11 violates both due process and equal protection, but does not address the latter claim. The equal protection guarantee is a measure of constitutional

tolerance in a governmental classification scheme. *Doe v. Dep't of Social Services,* 439 Mich. 650, 661; 487 NW2d 166 (1992). Having failed to brief the validity of any classification scheme, we conclude that plaintiff's argument is insufficient to invoke appellate review of his equal protection claim. *Goolsby, supra* at 655 n 1.

***5** With regard to defendant's due process claim, we note that the trial court granted defendant's motion with regard to this claim under both MCR 2.116(C)(8) and (C)(10), based on its determination that plaintiff failed to explain his due process claim in the first amended complaint, motion for summary disposition, or answer to defendant's motion for summary disposition. A motion under MCR 2.116(C)(8) is tested by the pleadings alone to determine if a claim upon which relief may be granted was stated. *Spiek, supra* at 337. Because plaintiff has not briefed the basis for the trial court's decision under MCR 2.116(C)(8), appellate relief is again precluded. *Roberts & Son Contracting, Inc, supra* at 113.

Furthermore, even if we were to examine plaintiff's due process claim under MCR 2.116(C)(10), we would not reverse the trial court's decision. A legitimate claim of entitlement is an essential part of a substantive due process claim. *Slocum v. Holton Bd of Ed,* 171 Mich.App 92, 99-100; 429 NW2d 607 (1988). When the matter is subject to discretionary action, rather than an application of rules to facts, a claim of entitlement fails. See *Bayview-Lofberg's, Inc v. Milwaukee,* 905 F.2d 142 (CA 7, 1990). See also *Spruytte v. Dep't of Correction,* 184 Mich.App 423, 427; 459 NW2d 52 (1990). Because plaintiff did not establish evidence of an entitlement, as a sewer user, to having sewer charges subsidized by landfill royalty revenues, we hold that plaintiff may not predicate his substantive due process claim on any reallocation by defendant of landfill royalty revenues from the sewer system to other uses.

Examined in this context, plaintiff's claim that he has factual support for a denial of substantive due process fails. Challenge to an ordinance on substantive due process grounds requires a consideration of whether the ordinance falls within the range of powers conferred by the Legislature and is reasonable, that is, rationally related to a municipality's exercise of police power and the public health, safety, morals and general welfare. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich,* 227 Mich.App 14, 25; 575 NW2d 56 (1997); see also *Valot v Southeast Local Sch Dist Bd of Ed,* 107 F3d 1220, 1228 (CA 6, 1997). Where the validity of the ordinance itself is not at issue, but rather, the manner in which it is executed, the proper focus is whether the ordinance was reasonably exercised. *Delta Charter Twp v. Dinolfo,* 419 Mich. 253, 270; 351 NW2d 831 (1984). The result of the legislative body's action, and not the motive, is generally of concern to the courts. See *Straus v. Governor,* 459 Mich. 526, 531; 592 NW2d 53 (1999), and *Kuhn v. Dep't of Treasury,* 384 Mich. 378, 383; 183 NW2d 796 (1971). But see *Sheffield Development Co v. City of Troy,* 99 Mich.App 527, 531; 298 NW2d 23 (1980).

Because plaintiff did not show that defendant lacked the authority, by ordinance, to revise the debt service charge, the relevant inquiry, for purposes of the substantive due process claim in this case, is whether defendant acted reasonably in setting the debt service charge, independent of any discretion that it might have available in allocating landfill royalty revenues to the debt. Upon de novo review of the record submitted to the trial court, we hold that plaintiff has failed to show a genuine issue of material fact on this issue or any other basis for disturbing the trial court's grant of summary disposition in favor of defendant on the substantive due process claim.

III

***6** Plaintiff next claims that the trial court erred in considering defective affidavits and post-resolution financial information. Having analyzed the proofs in light of the specific rulings of the trial court discussed previously in parts I and II of this opinion, we hold that plaintiff has not established any basis for disturbing the trial court's rulings.

Having failed to show that the trial court erred in granting summary disposition in favor of defendant on his various statutory, ordinance, and constitutional claims, we deny plaintiff's alternative request to remand for supplementation of the record. Plaintiff has not shown any basis for deviating from the general rule that enlargement of the record is not permitted. *Admiral Ins Co, supra at* 305; *Amorello, supra* at 330. Indeed, we note that the trial court, at the time of the hearing on the third motion for summary disposition, specified that it asked plaintiff's attorney if the scheduling of the motion for summary disposition needed to be moved because of

an outstanding issue concerning defendant's production of documents, but was advised that it was a separate issue and that "they wanted ruling on this motion." In any event, a motion for rehearing or reconsideration under MCR 2.119(F) could have been pursued if plaintiff desired to submit additional proofs or make further argument. The motion would have given the trial court discretion to give plaintiff a "second chance" with regard to the prior motion for summary disposition. See *Kokx v. Bylenga,* 241 Mich.App 655, 658-659; 617 NW2d 368 (2000). Thus, we find no justification for granting plaintiff's request for a remand.

Finally, having found no basis for reversal, we find it unnecessary to consider defendant's argument that an alternative basis for affirmance exists based on the doctrines of res judicata or collateral estoppel.

Affirmed.

All Citations

Not Reported in N.W.2d, 2002 WL 483507

Footnotes

1 Our holding that Resolution 96-11 is a resolution should not be construed as precluding its treatment as an "ordinance" for certain purposes in this appeal. As an example, we note that Ordinance 67, the ordinance addressing bonds issued under the Revenue Bond Act of 1933, M.C.L. § 141.101 *et seq.,* specifically defines ordinance as "this ordinance and any ordinance or resolution ...," for purposes of Ordinance 67, unless the context or use indicates another or different meaning or intent. The character of the Board of Trustee's official action in adopting Resolution 96-11 nevertheless remains that of a resolution.

2 We note that the defective affidavit was filed by defendant in response to plaintiff's motion for summary disposition and, in particular, concerned a transcript of a purported meeting held by defendant's Board of Trustees on the same day that Resolution 96-11 was adopted, which was qualified by a notation that, "board members did not identify themselves and much of the proceeding was unintelligible." Although plaintiff places weight on a statement in the transcript, plaintiff has failed to establish that it would be substantively admissible evidence to prove the truth of the matter asserted. Even if admissible to prove the truth of the matter asserted, the inference that plaintiff seeks to draw from the statement about the lack of "scientific studies" is speculative. Giving due consideration to the principle that the reasonableness of a utility rate is not subject to mathematical computation with scientific exactitude, but rather, depends on an examination of all factors involved, keeping in mind the objective sought, *City of Novi v. Detroit, supra* at 426-427, we are unpersuaded that the transcript, purportedly incomplete and inaccurate on its face, aids plaintiff's position that Ordinance No. 66 was violated, even assuming that § 7(A)(1) did apply to a debt service charge.

EXHIBIT 7

NATIONAL LEAGUE of CITIES | MUNICIPAL ACTION GUIDE

by Stephanie Rozsa and Caitlin Geary

Privatizing Municipal Services

In a world of constrained resources, local governments of all sizes and metro types are exploring new ways to reduce costs and infuse innovation. One method, privatization – the provision of goods or services to the public by private businesses under contract by the public sector — is increasingly looked to as a viable option. Privatization is grounded in the belief that market competition can be a more efficient and cost effective way to provide services. Today, facing recessionary deficits and shrinking municipal workforces, privatization is gaining popularity. In fact, many local governments are using privatization to turn the crisis into an opportunity by restructuring government management, modernizing delivery systems and raising new revenues in order to better serve residents and support long-term growth.

> The average American city currently works with private partners to perform 23 out of 65 basic municipal services.
>
> –National Council of Public-Private Partnerships

TYPES OF PRIVATIZATION

Privatization allows flexibility in deciding how much to involve the private sector in the design, building, operation, financing and ownership of public facilities and services. Here are the most common[1] types:

Contracting Out (Outsourcing) – Municipalities purchase or contract for services or functions, which may or may not have been previously performed by public sector employees.

Public-Private Partnership – Municipalities enter into a joint venture with one or more private companies to collaborate on any or all of the planning, funding and operation of a project.

Competitive Contract Bidding – Municipal departments or offices can bid for a city contract against private-sector companies.

Asset Sales/Lease – Municipalities sell or lease city assets to the private sector. Such assets might include land, buildings, utilities or other property.

Vouchers – Vouchers are coupons with monetary value that can purchase services in the private marketplace.

Government Corporations – This involves the establishment of a quasi-government agency, subject to overall regulation, but that functions more as a private business. These are more common at the federal level, like the postal service, but can occur at the local level through entities like municipal enterprises and special or public authorities.

Volunteer Partnerships – These are instances in which a function is mostly conducted by volunteers, but in which the municipality provides some degree of funding, guidance, and perhaps staffing.

Complete Privatization – A complete transfer of a function to a private entity.

1 Stone, Mary N., Perspectives on Privatization by Municipal Governments, National League of Cities, Washington, D.C., 1997, pg. 3.

POTENTIAL BENEFITS

Unlike other funding methods, privatization allows communities the flexibility to locally determine their own growth and development. While privatization's record of success is not guaranteed, here are some considerations that will increase the likelihood of success.[2] [3] [4]

> "The role of local government is to represent, identify, defend and express the public interest, and the services it provides should be determined locally."
>
> – Dr. Michael Pagano, College of Urban Planning and Public Affairs, University of Illinois at Chicago

Cost Savings. As citizen demand for services increases and government revenue decreases, the private sector also offers additional advantages that benefit the bottom line, including market competition; access to an agile talent pool; purchasing power; flexible resource deployment; service improvement without an increase in tax rates or user fees; significant tax benefits that can reduce net costs; and the creation of economies of scale. An economy of scale is especially important for cities too small to have sufficient staff expertise or command market power in purchasing. According to the National Center on Public Private Partnerships, governments often realize cost savings of 20 to 50 percent when the private sector is involved in service provision.

Private Sector Proficiencies. The public sector can draw on the vast knowledge of the private sector, including workplace efficiencies that reduce demands on a shrinking city workforce. In addition to abundant technical and financial expertise, the private sector usually boasts superior access to newer technologies and far more diverse funding sources. Such a partnership also introduces innovative management practices and flexible operating procedures into the public sector and allows both parties to share the construction, operations, management and financial risks.

Red Tape Reduction. Operating in the private sector often involves less bureaucracy, which leads to expeditious project completion. And as municipalities confront tax and spending limitations, outside funding offers flexibility to increasingly constrained municipal budgets.

POTENTIAL DOWNSIDES

While privatization can be an effective management and service delivery tool, it remains a complicated and controversial process. Municipal leaders should consider the following:

Conflicts of Interest. When a profit-focused private company provides public services, a conflict of interest may be created if the company attempts to cut corners or exercise policy-making authority. This issue can be addressed by bundling services, contract clarity and effective contract enforcement.

Decreased Control. Once a public asset is transferred to the private sector, municipal control and oversight is automatically reduced. And while risk is shared between sectors, it is also increased by adding a new partner into a process normally initiated by a single sector.

Citizen Dissatisfaction. If the voting public regards the private sector or the particular private partner negatively, enthusiasm for even the most well-planned partnership can be dampened. Disgruntled citizens can also jeopardize a project in progress if their concerns are ignored.

Imprecise Performance Measurement. Accurate quantitative measures tell the story of a contractor's cost and performance efficiencies. Such measures, however, are difficult for cities to produce accurately and consistently, as service indicators and cost-benefit evaluations are often not standardized.

---

2 Kemp, Roger, *Privatization: The Provision of Public Services by the Private Sector,* McFarland and Company, Jefferson, North Carolina, 1991.

3 Fryklund, Inge et. al., *Municipal Service Delivery: Thinking Through the Privatization Option. A Guide for Local Elected Officials,* National League of Cities and the Center for the Study of Ethics in the Professions, Illinois Institute of Technology, Washington, D.C., 1997.

4 National League of Cities, *Legislating For Results: Motivating Contractors and Grantees to High Levels of Performance,* Washington, D.C., 2008.

ACTION STEPS

Listed below are recommended action steps gleaned from successful case studies.[5] [6] These general recommendations should be tailored to site- and project-specific requirements.

ASSESSMENT

- Define the needs and objectives to be accomplished by the project, and confirm the availability of resources to support the project through its full life cycle.
- Perform a feasibility study, which will evaluate the potential impact of the project. If an employee cannot perform the task, hire an outside consultant with a thorough understanding of the tax laws.
- Determine the current and future costs and savings through a pricing study or financial risk analysis. Clarify the financial standing of the public and private partners in terms of available capital and access to borrowing.
- Determine the amount of stakeholder support for the project. Encourage cross-agency and union collaboration so all affected stakeholders can lend insight and become invested in the project.
- Analyze political risk, build the coalitions necessary to support the change, and communicate clearly and frequently with the public.
- Seek assistance from the state's privatization board, commission, or council, if available.
- Examine existing labor contracts and statutory, regulatory and tax laws. Make modifications as necessary.
- Evaluate proposals using several criteria: contractor capacity, experience and reputation; net cost and cost per unit; and demands on city resources. Aim to have at least three bidders.

NEGOTIATION

- Hire an expert to negotiate a sound legal contract. The expert may come from your city's legal and purchasing departments or an outside organization.
- Clearly detail all expectations, performance indicators, obligations, communication guidelines, risk-sharing guidelines, incentives for superlative performance and penalties for nonperformance. Have measures in place for removing the contractor for consistent nonperformance.
- Maximize contractor incentives. One method is to bundle one or more phases of the project, which include the design, construction, service provision and long-term maintenance. Another method is quarterly incentives.
- Determine the appropriate contract term period, and anticipate a contract renegotiation process for additional or modified responsibilities, fees or payments. Include an exit strategy that details measures for the transference of the service back to the public sector, if applicable.
- Minimize disruptions in service continuity by making the transition as fluid as possible.

OVERSIGHT

- Assign a municipal department familiar with or responsible for the service to perform daily contract management.
- Establish regular on-site inspections and reporting by that department or an outside party. This should include quality control reviews.
- Hire a third party to perform formal financial and operational annual audits to track compliance with all contractual provisions, performance standards and all funds collected or expended.
- Hold council hearings if major contract breeches or complaints are filed.

---

5 Fryklund, Inge et. al., *Municipal Service Delivery: Thinking Through the Privatization Option. A Guide for Local Elected Officials,* National League of Cities and the Center for the Study of Ethics in the Professions, Illinois Institute of Technology, Washington, D.C., 1997.

6 National League of Cities, *Legislating For Results: Motivating Contractors and Grantees to High Levels of Performance,* Washington, D.C., 2008.

- Maintain open lines of communication with the public about the new service. Provide a forum for community input and complaints. Include overall satisfaction levels as part of the contractor's evaluation.

EXAMPLES

PUBLIC-PRIVATE PARTNERSHIP: BALTIMORE

The City of Baltimore recently initiated a five-year joint venture with Ports America Chesapeake to update the Seagirt Marine Terminal. At $106 million, the investment was too expensive for the city to finance alone. The modifications will allow for cargo to be received and mobilized more efficiently. The project will create 3,000 construction jobs and 2,700 direct, indirect, or induced jobs over the course of the next three years and will generate nearly $16 million in new taxes for the state. In addition, Ports America agreed to pay more than $100 million to the state of Maryland for road, bridge and tunnel modernization.

COMPLETE PRIVATIZATION: SANDY SPRINGS, GEORGIA

Following its incorporation in 2005, the City of Sandy Springs opted to contract out all government services except public safety instead of creating a new municipal bureaucracy. This model saved its citizens upwards of 30 percent in taxes in the first year alone over the rate they paid to the county before incorporation. Inspired by this model, three neighboring communities have since incorporated using the same model and contractor, and a fourth recently incorporated and is contracting out bundles of services rather than hiring one operator.

COMPETITIVE BIDDING: PHOENIX

Between 1979 and 1994, Phoenix institutionalized competition by inviting private sectors to bid alongside city agencies for contracts. For example, the city geographically divided itself into three sectors for waste collection purposes and put each sector out to bid on a rotating schedule, and for which firms can serve no more than one of the three sectors. To secure the integrity of that process, the city's bid is prepared by an independent auditor and submitted under the same conditions as private bids. During that period, Phoenix awarded 56 contracts in 13 municipal services by this process, with 34 contracts going to private contractors and 22 remaining with the city agencies, saving $30 million.

ABOUT THIS PUBLICATION

Stephanie Rozsa works in the Knowledge Development Program, and Caitlin Geary is a fellow in the Economic Development Program, both in the Center for Research and Innovation at the National League of Cities. For additional information about privatization, contact Ms. Rozsa at policy2@nlc.org and Ms. Geary at Geary@nlc.org.

The National League of Cities is the nation's oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership, and governance. NLC is a resource and advocate for more than 1,600 member cities and the 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans.

Through its **Center for Research and Innovation**, NLC provides research and analysis on key topics and trends important to cities, creative solutions to improve the quality of life in communities, inspiration and ideas for local officials to use in tackling tough issues and opportunities for city leaders to connect with peers, share experiences and learn about innovative approaches in cities.

EXHIBIT 8

Posted on Thu, Dec 1, 2011 : 4:10 p.m.

Michigan House passes legislation allowing privatization of local building departments

By Ryan J. Stanton

The **Michigan House** today approved legislation that would amend state law (http://www.legislature.mi.gov/(S(jmxqjo553uorajizti3khiaz))/mileg.aspx?page=getObject&objectName=2011-HB-5011) to allow local governments to contract with private companies to operate their building departments.

The bill also would expand the definition of "building official" in the State Construction Code Act of 1970 to include employees of private companies.

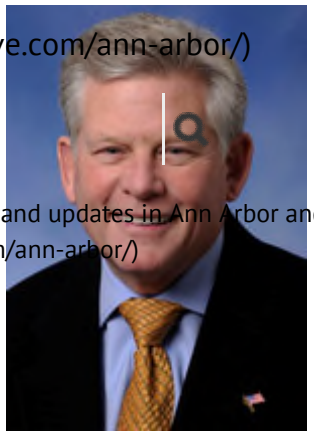
House Bill 5011 (http://www.legislature.mi.gov/(S(jmxqjo553uorajizti3khiaz))/mileg.aspx?page=getObject&objectName=2011-HB-5011), sponsored by state Rep. **Mark Ouimet**, R-Scio Township, was approved by a 77-30 vote and now goes to the Senate for consideration.

Ouimet believes the change in law will foster new development by allowing Michigan businesses to receive local building permits more quickly and efficiently.

"This legislation gives local governments another tool in their toolbox to encourage economic development and help create jobs for local families," Ouimet said in a statement. "While our upcoming state tax reforms will give job creators the chance to expand and hire more workers, this legislation helps ensure that the process to do so is efficient and timely."

Specifically, the bill would authorize local governments to contract with private companies for specific administrative and enforcement activities, including building inspections and plan reviews.

Private companies would not be able to issue orders, notices, certificates or permits, but could process and deliver documents pending the approval of a building official.



Mark Ouimet

Under state law, a local government enforcing the State Construction Code must provide the services required by the act, including issuing permits and orders, conducting inspections, performing plan reviews and determining the safety of structures.

For a variety of reasons, many local governments already have opted to privatize those services by contracting with private companies.

"While this is a common practice, the act does not appear to be clear on what responsibilities can be delegated to the private organization," according to a House Fiscal Agency analysis released this week.

According to a 1975 attorney general's opinion, local governments can contract with private companies for inspection and technical services, but the designated enforcing agency must be a public official and all final determinations must be made by the enforcing agency.

"This bill is an attempt to provide clarity on the functions private organizations can legally perform and who is legally considered a building official," the analysis states.

Specifically, the bill would allow a local government to contract with a private company to do any of the following:

- Receive applications for building permits.
- Receive payments of fees and fines on behalf of the governmental subdivision.
- Perform plan reviews using plan reviewers registered under the Building Officials and Inspectors Registration Act of 1986
- Perform inspections using inspectors registered under the Building Officials and Inspectors Registration Act of 1986
- Approve temporary service utilities.
- Make determinations that structures or equipment are unsafe.
- Process and deliver correction notices.
- Issue orders to connect or disconnect utility service in emergency situations.
- Issue orders to vacate premises in emergency situations.

Private companies also would be able to process and deliver any of the following after their issuance has been approved by a building official:

- Orders to connect or disconnect utility service in a non-emergency situation.
- Orders to vacate premises in non-emergency situations.
- Building permits.

- Temporary or permanent certificates of use and occupancy.
- Orders to suspend, revoke, or cancel a building permit or certificate of occupancy.
- Violation of notices.
- Notices to appear or show cause.
- Stop work orders.
- Orders to remedy noncompliance.

Ouimet worked with lawmakers from both parties to build support for the bill, which is being co-sponsored by state Rep. **David Rutledge**, D-Superior Township, and 11 others.

As chairman of the House Local, Intergovernmental, and Regional Affairs Committee, Ouimet said he has made it a priority to streamline government and improve services.

He noted some municipalities already contract out for building permit services, and his bill will ensure the practice can continue while encouraging others to improve their permit processes.

Local municipalities still have the option to contract with county or state building officials for the same services under the proposed legislation.

Ryan J. Stanton covers government and politics for AnnArbor.com. Reach him at ryanstanton@annarbor.com (mailto:ryanstanton@annarbor.com) or 734-623-2529. You also can follow him on Twitter (http://twitter.com/ryanjstanton) or subscribe (http://www.annarbor.com/newsletter/signup/sign_up.php?aacid=NL_Signup_Main_Nav) to AnnArbor.com's e-mail newsletters.

[redacted]

[redacted]

Thu, Dec 1, 2011 : 10:05 p.m.

[redacted]

EXHIBIT 9

City of Hamtramck

3401 Evaline Street Hamtramck, Michigan 48212

Telephone 313-876-7700

Cathy L. Square, Emergency Manager

Dated: November 12, 2013

ORDER NO. S-005

RE: Contract for Professional Services with SAFEbuilt Michigan, Inc.

TO: City Clerk
Mayor
City Council

The Local Financial Stability and Choice Act (Act 436 of 2012/MCL 141.1541, et. seq.) in Section **10(1)** states that "[a]n emergency manager shall issue orders to the appropriate local elected and appointed officials and employees, agents, and contractors of the local government the orders the emergency manager considers necessary to accomplish the purposes of [the] act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan… or to take actions, or refrain from taking actions, to enable the orderly accomplishment of the financial and operating plan." Any such orders are binding on the local elected and appointed officials and employees, agents, and contractors of the local government to whom they are issued.

Section 12(1) provides that an Emergency Manager may take one or more of the following actions: **(g)** Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any new position, or the filling of any vacancy in a position by any appointing authority; **(n)** Consolidate or eliminate departments of the local government or transfer functions from 1 department to another and appoint, supervise, and, at his or her discretion, remove administrators, including heads of departments other than elected officials; **(o)** Employ or contract for, at the expense of the local government and with the approval of the state financial authority, auditors and other technical personnel considered necessary to

implement this act; **(ee)** Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities; and **Section 19(2)** Except as otherwise provided in this act, during the pendency of the receivership, the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the emergency manager.

It is hereby ordered:

1. Agreement for Professional Services with SAFEbuilt Michigan, Inc. to provide Building Department Administrative, Building official, Administrative Support, Building Mechanical/Plumbing/Electrical, Plan Review, Inspection and Contract Licensing and Registration Services is hereby entered into by the Emergency Manager on behalf of the City in the form attached to this Order.

This Order shall take immediate effect.

Copies of the documents referenced in this Order are to be maintained in the offices of the City Clerk and may be reviewed and/or copies may be obtained upon submission of a written request consistent with the requirements of the Michigan Freedom of Information Act and subject to any exemptions contained in that state statute and subject to any exemptions allowed under that statute (Public Act 442 of 1976, MCL 15.231, et. seq.).

This order is effective as indicated and is necessary to carry out the duties and responsibilities required of the Emergency Manager as set forth in the Local Financial Stability and Choice Act (Act 436 of 2012/MCL 141.15411, et. seq.) and the contract between the Local Emergency Financial Assistance Loan Board and the Emergency Manager.

Cathy Square
City of Hamtramck
Emergency Manager

cc: State of Michigan Department of Treasury

EXHIBIT 10

FOR IMMEDIATE RELEASE
January 13, 2015

FOR MORE INFORMATION:
Contact: Scott Martin
smartin@SAFEbuilt.com
248-515-2899

HARPER WOODS AND LINCOLN PARK JOIN GROWING LIST OF MICHIGAN COMMUNITIES PARTNERING WITH SAFEBUILT

The cities of Harper Woods and Lincoln Park, Michigan, have recently partnered with SAFEbuilt, a leading contract provider of community development solutions, to provide their communities with comprehensive building department services. SAFEbuilt began providing services for both cities back on November 3, 2014.

"We are really excited about these two partnerships, they will be a great fit," said Steve Burns, SAFEbuilt's Regional Operations Manager. "We look forward to working with city staff, residents, developers and contractors to improve service levels, and make these great communities an even better place to live, work, and play."

The agreement for the city of Harper Woods is for full building department services as well as community improvement services which includes code enforcement services and rental housing program administration. In Lincoln Park, SAFEbuilt is providing full building department services along with rental housing program administration.

"SAFEbuilt provides Lincoln Park with a level of professionalism and efficiency that was sorely lacking in our building department," said Brad Coulter, Emergency Manager in Lincoln Park. We have seen a dramatic improvement in customer service since bringing in SAFEbuilt."

With these new partnerships, SAFEbuilt now serves seven full service communities and seven supplemental service clients in Michigan. In addition, LSL Planning, SAFEbuilt's planning division, partners with 51 communities in Michigan, bringing the state total to 65.

Harper Woods City Manager, Randolph Skotarczyk, indicated that the high praise they received from existing customers during the due diligence process, was a key factor in their decision to partner with SAFEbuilt. "The SAFEbuilt staff has approached this endeavor with enthusiasm and considerable professionalism. We are already seeing an observable improvement in record keeping, customer outreach, and reduced turnaround time in our permitting," said Skotarczyk. "They have identified, and are in process of, correcting some significant problems and I have received compliments from residents and contractors on their helpfulness and efficiency. I look forward to a long and productive relationship with SAFEbuilt."

About SAFEbuilt

SAFEbuilt offers complete community development services, partnering with over 200 communities of all shapes and sizes throughout the country for the efficient delivery of privatized community development solutions including building department services, community & transportation planning and community improvement services. SAFEbuilt works closely with local governments to meet their communities' unique needs by offering a personalized approach that features over 22 years of proven best practices, expert personnel, innovative software, and improved service levels.

- end-

EXHIBIT 11

SafeBuilt lays a foundation in Muskegon for the potential of consolidated inspections countywide

Dave Alexander | dalexan1@mlive.com By **Dave Alexander | dalexan1@mlive.com**

Follow on Twitter

on January 30, 2014 at 6:45 AM, updated January 30, 2014 at 7:44 PM

We've encouraged all municipalities to look at the services SafeBuilt can provide. -- Chamber's Cindy Larsen

MUSKEGON, MI – The Muskegon-area business community is pushing for consolidation of municipal building inspection services through a private company from Loveland, Colo.

What SafeBuilt Inc. is attempting across Michigan and in six other states is what those supporting **the Muskegon Lakeshore Chamber of Commerce's shared services study** have sought: Consolidating a government service such as building inspections at a cost savings to the taxpayers and an improved service to the community.

Consolidation of inspection services was among the more than a dozen recommendations from the 2011 shared services study – a collaboration among the chamber and Muskegon County local units of government.

Muskegon County, along with local cities and townships, looked at creating a consolidated, countywide inspection department but the municipalities were unable to make such a plan financially viable, participants said.

And then SafeBuilt came to town.

The company was founded in Colorado in 1992 and purchased by current president Mike McCurdie in 1999 with the intention of taking the privatization of building and inspection services to municipalities across the county. SafeBuilt has 140 municipal customers in seven states, including Michigan where the company has set up an office in Troy.

RELATED: Muskegon city officials to use SafeBuilt to lead fight against blight in local neighborhoods

Among those 140 customer communities is the city of Muskegon, which began by out-sourcing its **building inspection department in 2012 to SafeBuilt** and by the end of 2013 had **expanded its contract with the company** to provide environmental code enforcement and residential rental unit inspections.

"We've encouraged all municipalities to look at the services SafeBuilt can provide," Muskegon chamber President Cindy Larsen said. "The ultimate goal here is a stronger community."

Cindy Larsen

SafeBuilt began its West Michigan presence in Muskegon but the company wants to build from that base, according to its regional supervisor Kirk Briggs. SafeBuilt successfully bid on inspection contracts with the cities of Norton Shores and Muskegon Heights now providing electrical/plumbing and mechanical/plumbing inspection services, respectively.

"Expanding into other local units helps me in sharing the costs," said Briggs, who is a 20-year veteran municipal building inspector who most recently was the building inspector for Grand Haven Township. "It allows us to do our work with lower fees and we will be able to provide a discount when we hit a certain level."

In other markets where SafeBuilt has provided multiple municipalities with inspection services, the benefit is for more uniform enforcement, further cost savings, processes such as a one-page uniform application and the consistent inspection fees across the community, Briggs said.

Briggs said SafeBuilt has had some initial discussions with officials in Egelston Township among others, but a consolidated inspection service for all Muskegon County local units of government with SafeBuilt – or another private inspection service company – is not in the immediate future.

"Government only moves at the pace of government," said Briggs, who has been in West Michigan local government for more than 20 years. "This is going to take some time to make this a consolidated system."

The initial reaction from local SafeBuilt customers has been positive, starting with the city of Muskegon.

"They bring a level of professionalism that is second to none," Muskegon City Manager Frank Peterson said. "They are well qualified. SafeBuilt is working with folks from the weekend warrior to the professional contractor."

Frank Peterson

That level of service and estimated cost savings to the city of $115,000 the first year SafeBuilt provided building inspection services led to an expansion of its contract with the city.

Meanwhile, SafeBuilt began to pursue other business in surrounding municipalities. The city of Norton Shores has always contracted with independent inspectors for its building services, according to Mayor Gary Nelund.

And when the Norton Shores contract for electrical and plumbing inspection services came due, SafeBuilt was ready.

"SafeBuilt had the best proposal," Nelund said. "They have more than one person to serve us. We find them very customer-service oriented. And they have become a buffer between the city and the citizens … all the way around it has been great."

Nelund, who was at the center of the chamber discussions on shared services, said the participating municipalities in the study joined with Muskegon County to discuss a consolidated inspections department through a county department. The county was not in financial position to create a new department, he said.


Gary Nelund

The city is now having discussions with SafeBuilt to provide a new rental inspections program for Norton Shores, the mayor said. It would be similar to the inspections of residential rental properties done in the city of Muskegon, a service just added to Muskegon's SafeBuilt contract.

"We are just finding a lot more flexibility with SafeBuilt," Nelund said.

The city of Muskegon Heights also is pleased with its initial use of SafeBuilt inspectors for mechanical and plumbing, City Manager Natasha Henderson said. SafeBuilt was contracted for a specific service, not in a move toward countywide consolidation of building inspections.

"It has worked out well with SafeBuilt," Henderson said. "Consolidation is not what we were looking for but we are always willing to look for different ways to collaborate."

From a business standpoint, having one county consolidated building inspections department or having the service provided countywide by one company would be a huge benefit, chamber officials said. There is likely cost savings as staff can be moved from one municipality to another as work load demands and interpretations of building codes are consistent across municipal lines for contractors and building owners, they argue.

The chamber's Larsen explained that in the private sector, time is money. Thus, building contractors and developers need to quickly have inspections so projects can continue on track and on time, she said.

"The quicker a building or facility is up and running, the better chance that the new business has of survival," Larsen said, adding that SafeBuilt has a policy of responding to inspection requests within 24 hours wherever possible. Not all municipal inspection departments can have such policies, especially if there is only one inspector in a city or township.

And the consistency of the service is critical for those contractors working in multiple jurisdictions, Larsen said.

"Inconsistency is another cost to business," the chamber president said. "Restaurant plans acceptable on one side of the street but not on the other causes confusion and additional time and costs."

The Shared Services Subcommittee of the chamber's Governmental Affairs Committee has been working on inspection department issues and working with SafeBuilt, according to subcommittee head Bill Loxterman, who has served 15 years on the North Muskegon City Council – eight as mayor pro tem.

"In my opinion, SafeBuilt is a perfect public-private partnership," Loxterman said. "One of the things the committee wanted was to wait and see how they performed. What I gather is there are no red flags yet. They have proven they are able to take on more. There have been a lot of positives."

Hiring SafeBuilt raises tricky political issues of "privatization" and "outsourcing," Loxterman acknowledges. Some local governments are more open to those concepts than others but when dealing with personnel and people's government jobs it is always a difficult conversation, he said.

"Every government unit must make its own decision," Loxterman said of going with a company like SafeBuilt for building inspection services. "But all should look at their own bottom line and how they are serving the business community. Hopefully, SafeBuilt will permeate more into the county."

Coming Next: A profile of the SafeBuilt.

Dave Alexander covers business and local government for MLive/Muskegon Chronicle. Email him at ***dalexan1@mlive.com*** *and follow him on* ***Facebook*** *and* ***Twitter****.*

EXHIBIT 12

Owosso Selects Local Contractor to Manage Building Inspections

May 18, 2016 • Wednesday

The Owosso City Council recently finalized a plan to hire private building inspection company SAFEbuilt Michigan, LLC, to manage the city's building inspections. The company will perform inspections for all current construction within the city and for all new building permits.

"The strong economic comeback we are seeing in Owosso has meant that an unprecedented number of development projects are currently underway," said Owosso Mayor Ben Frederick. "This new partnership with locally-based professionals ensures a common sense approach to city plan review and permitting. I am optimistic that entrepreneurial momentum will continue to build throughout our community." Further added by Susan Montenegro, Owosso Assistant City Manager/Community Development Director, "We are delighted to have SAFEbuilt expand the services they are providing the city and believe this partnership will continue the forward momentum of Owosso."

SAFEbuilt Michigan currently serves 17 communities in Michigan, including Mundy Township (Genesee County). In addition to Michigan, the company provides building inspection services, community planning, code enforcement, and permit software to over 400 communities across the country. The company had already been working with the City of Owosso on plumbing inspections, and by adding building inspections, the city will be able to make the development process more efficient.

"Communities like Owosso are a perfect fit for this kind of public/private partnership," said SAFEbuilt President, Greg Toth. "SAFEbuilt is able to provide professional inspection services in a transparent manner, often with short guaranteed turnaround times and at a lower cost than the city could otherwise perform the inspections. With our local Michigan team, we will be able to serve Owosso residents, businesses, and developers very well."

The inspectors who will be completing building inspections in Owosso will live in or around the community, and has regular office hours. SAFEbuilt is obligated via their contract to issue or deny residential building permits within five days, commercial building permits within 10 days, and complete most inspections the day after they are requested.

"I appreciate the predictability of service times in their contract, and I'm confident that our local developers will as well. SAFEbuilt has a solid reputation in the industry and we are looking forward to positive communication leading to safe and rational development outcomes," said Jeff Deason, President of the Shiawassee Regional Chamber of Commerce.

Paul Brake, SAFEbuilt Michigan Director of Operations, Sciota Township resident and former Shiawassee County Administrator, added, "SAFEbuilt's customer satisfaction rates exceed 92 percent nearly every year. I know our neighbors will appreciate our predictable inspection timelines, our high level of professionalism, and our business-friendly attitude."

"I have known and worked with Paul for a number of years – he is very professional, knowledgeable, and understands that you must have a business-friendly local government to attract economic development. I am confident that he and the entire SAFEbuilt team will provide timely, high-quality services that will ensure investor confidence in the community that we have come to expect here in Owosso," said Justin Horvath, Shiawassee Economic Development Partnership President/CEO.

SAFEbuilt has begun performing inspections as of May 11. City and company officials do not foresee any delay as a result of the transition.

EXHIBIT 13

MACKINAC CENTER
FOR PUBLIC POLICY

SPECIAL ITEMS

II. Advantages of Privatization

By William D. Eggers, published on Jan. 1, 1993

Many reasons explain the movement by cities and states toward privatization to restructure and "rightsize" government. Much of the impetus is the desire to inject competition into the delivery of state services in order to provide services to citizens in a more-efficient and cost-effective manner. If structured appropriately and sufficiently monitored, privatization can:

1. **SAVE TAXPAYERS' MONEY**
2. **INCREASE FLEXIBILITY**
3. **IMPROVE SERVICE QUALITY**
4. **INCREASE EFFICIENCY AND INNOVATION**
5. **ALLOW POLICYMAKERS TO STEER, RATHER THAN ROW**
6. **STREAMLINE AND DOWNSIZE GOVERNMENT**
7. **IMPROVE MAINTENANCE**

SAVE TAXPAYERS' MONEY

By applying a variety of privatization techniques to state services, infrastructure, facilities, enterprises, and land, comprehensive state privatization programs can reduce program costs.

Over 100 studies have documented cost savings from contracting out services to the private sector.[17] Cost savings vary but average between 20 and 40 percent, depending on the service. For some services, such as prison construction and operation, savings are generally less, while for others, such as asphalt resurfacing, savings are often greater. Competitive bidding whenever possible and careful government oversight are crucial to sustained cost savings.

States can also realize large one-time windfalls from the sale or lease of state infrastructure and facilities. Moreover, privatization can put an end to subsidies to previously government-run operations.

Privatization also creates a steady stream of new tax revenues from private contractors and corporations who pay taxes and license fees, while state units do not.

INCREASE FLEXIBILITY

Privatization gives state officials greater flexibility to meet program needs. Officials can replace the private firm if it isn't meeting contract standards, cut back on service, add to service during peak periods, or downsize as needed.

IMPROVE SERVICE QUALITY

A number of surveys have indicated that public officials believed service quality was better after privatization. In a survey of 89 municipalities conducted in 1980, for example, 63 percent of public officials responding reported better services as a result of contracting out.[18]

If competitive bidding is instituted for a service, service quality can improve even if the service is retained in-house. The reason is simple: competition induces in-house and private service providers to provide quality services in order to keep complaints down and keep the contract.

Service quality is not assured, however, by privatization. Contracts must be well-designed with performance standards that create incentives for high quality service. Furthermore, diligent monitoring of the contractor's performance through customer surveys and on-site inspections must also be performed by government in its oversight role.

INCREASE EFFICIENCY AND INNOVATION

Private management can significantly lower operating costs through the use of more flexible personnel practices, job categories, streamlined operating procedures, and simplified procurement.[19]

Private ownership can stimulate innovation. Competition forces private firms to develop innovative, efficient methods for providing goods and services in order to keep costs down and keep contracts. These incentives, for the most part, do not exist in the public sector.

ALLOW POLICYMAKERS TO STEER, RATHER THAN ROW

Privatization allows state officials to spend less time managing personnel and maintaining equipment, thus allowing more time to see that essential services are efficiently delivered.

STREAMLINE AND DOWNSIZE GOVERNMENT

Privatization is one tool to make bureaucracies smaller and more manageable. Large private corporations often sell off assets that are underperforming or proving too difficult to manage efficiently. Under new owners and leaner management, such divisions often receive a new lease on life. Entrepreneurial governments can replicate this experience.

IMPROVED MAINTENANCE

Private owners are strongly motivated to keep up maintenance in order to preserve the asset value of the investment in the facility. Public owners often defer maintenance due to political considerations, increasing overall long-term costs.

SKU: PM1993-06

EXHIBIT 14

Harvard Business Review

ECONOMY

Does Privatization Serve the Public Interest?

by John B. Goodman and Gary W. Loveman

FROM THE NOVEMBER-DECEMBER 1991 ISSUE

For decades prior to the 1980s, governments around the world increased the scope and magnitude of their activities, taking on a variety of tasks that the private sector previously had performed. In the United States, the federal government built highways and dams, conducted research, increased its regulatory authority across an expanding horizon of activities, and gave money to state and local governments to support functions ranging from education to road building. In Western Europe and Latin America, governments nationalized companies, whole industries, banks, and health care systems, and in Eastern Europe, communist regimes strove to eliminate the private sector altogether.

Then in the 1980s, the tide of public sector expansion began to turn in many parts of the world. In the United States, the Reagan administration issued new marching orders: “Don’t just stand there, undo something.” A central tenet of the “undoing” has been the privatization of government assets and services.

According to privatization’s supporters, this shift from public to private management is so profound that it will produce a panoply of significant improvements: boosting the efficiency and quality of remaining government activities, reducing taxes, and

shrinking the size of government. In the functions that are privatized, they argue, the profit-seeking behavior of new, private sector managers will undoubtedly lead to cost cutting and greater attention to customer satisfaction.

This newfound faith in privatization has spread to become the global economic phenomenon of the 1990s. Throughout the world, governments are turning over to private managers control of everything from electrical utilities to prisons, from railroads to education. By the end of the 1980s, sales of state enterprises worldwide had reached a total of over $185 billion—with no signs of a slowdown. In 1990 alone, the world's governments sold off $25 billion in state-owned enterprises—with continents vying to see who could claim the privatization title. The largest single sale occurred in Britain, where investors paid over $10 billion for 12 regional electricity companies. New Zealand sold more than 7 state-owned companies, including the government's telecommunications company and printing office, for a price that topped $3 billion.

Developing countries have been quick to jump on the privatization bandwagon, sometimes as a matter of political and economic ideology, other times simply to raise revenue. Argentina, for example, launched a major privatization program that included the sale of its telephone monopoly, national airline, and petrochemical company for more than $2.1 billion. Mexico's aggressive efforts to reduce the size and operating cost of the public sector have resulted in proceeds of $2.4 billion.

Over the next decade, privatization is likely to be at the top of the economic agenda of the newly liberated countries in Eastern Europe, as well. Czechoslovakia, Hungary, and Poland are all committed to privatization and are in the process of working out the legal details. The most extensive change thus far has taken place in what was the German Democratic Republic. In 1990 alone, the Treuhandanstalt—the public trust

agency charged by the German government with the task of privatization arranged the sale of more than 300 companies for approximately $1.3 billion. The agency still has more than 5,000 companies on its books, all looking for buyers.

Having migrated around the world, privatization has also changed venue in the United States, from the federal government to state and local governments. Over 11 states are now making use of privately built and operated correctional facilities; others plan to privatize roadways. At the local level, communities are turning to private operators to run their vehicle fleets, manage sports and recreation facilities, and provide transit service. In the past several years, more and more state and local governments have adopted privatization as a way to balance their budgets, while maintaining at least tolerable levels of services.

This growth of privatization has not, of course, gone uncontested. Critics of widespread privatization contend that private ownership does not necessarily translate into improved efficiency. More important, they argue, private sector managers may have no compunction about adopting profit-making strategies or corporate practices that make essential services unaffordable or unavailable to large segments of the population. A profit-seeking operation may not, for example, choose to provide health care to the indigent or extend education to poor or learning-disabled children. Efforts to make such activities profitable would quite likely mean the reintroduction of government intervention—after the fact. The result may be less appealing than if the government had simply continued to provide the services in the first place.

The Privatization Papers

Overriding the privatization debate has been a disagreement over the proper role of government in a capitalist economy. Proponents view government as an

The Promise of Privatization: A Challenge for American Foreign Policy, edited by Raymond Vernon (New York, New York: Council on Foreign Relations, 1988).

"Privatization in America: An Opinion Survey of City and County Governments on Their Use of Privatization and Their Infrastructure Needs," Touche Ross (1987).

"State Government Privatization in America: An Opinion Survey of State Governments on Their Use of Privatization," by Touche Ross (1989).

Privatizing Federal Spending: A Strategy to Eliminate the Deficit, Stuart Butler (New York, New York: Universe Books, 1985).

Privatization 1991, Fifth Annual Report on Privatization (Santa Monica, California: Reason Foundation).

The Privatization Decision: Public Ends, Private Means, John Donahue (New York, New York: Basic Books, 1989).

"The Limits of Privatization," Paul Starr (Washington, D.C.: Economic Policy Institute, 1987).

"Department of Self-Services," Michael Willrich *(Washington Monthly,* October 1990).

unnecessary and costly drag on an otherwise efficient system; critics view government as a crucial player in a system in which efficiency can be only one of many goals.

There is a third perspective: the issue is not simply whether ownership is private or public. Rather, the key question is under what conditions will managers be more likely to act in the public's interest. The debate over privatization needs to be viewed in a larger context and recast more in terms of the recent argument that has raged in the private sector over mergers and acquisitions. Like the mergers and acquisitions issue, privatization involves the displacement of one set of managers entrusted by the shareholders—the citizens—with another set of managers who may answer to a very different set of shareholders.

The wave of mergers and acquisitions that shook the U.S. business community in the late 1980s was a stark demonstration that private ownership alone is not enough to ensure that managers will invariably act in the shareholders' best interests. The sharp

"Without Competing Bids, New York Pays the Price," Dean Baquet and Martin Gottlieb (Part of Special Report, "The Contract Game: How New York Loses" *New York Times,* February 19, 1991).

"Economic Perspectives on Privatization," John Vickers and George Yarrow *(Journal of Economic Perspectives,* Spring 1991).

"Eclipse of the Public Corporation," Michael Jensen *(Harvard Business Review,* September–October 1989).

Reinventing Government, David Osborne and Ted Gaebler (Reading, Massachusetts: Addison-Wesley, forthcoming in 1992).

increase in shareholder value generated by most of the takeovers was the result of the market's anticipation of improvements in efficiency, customer service, and general managerial effectiveness—gains which might, for example, come from the elimination of unnecessary staff, the cessation of unprofitable activities, and improvements in incentives for managers to maximize shareholder value. In other words, the gains from takeovers were the result of the anticipated removal of managerial practices commonly thought to characterize public sector management. The lessons from this experience are directly applicable to the debate over privatization: managerial accountability to the public's interest is what counts most, not the form of ownership.

Refocusing the discussion to analyze the impact of privatization on managerial control moves the debate away from the ideological ground of private versus public to the more pragmatic ground of managerial behavior and accountability. Viewed in that context, the pros and cons of privatization can be measured against the standards of good management—regardless of ownership. What emerges are three conclusions:

1. Neither public nor private managers will always act in the best interests of their shareholders. Privatization will be effective only if private managers have incentives to act in the public interest, which includes, but is not limited to, efficiency.

2. Profits and the public interest overlap best when the privatized service or asset is in a competitive market. It takes competition from other companies to discipline managerial behavior.

3. When these conditions are not met, continued governmental involvement will likely be necessary. The simple transfer of ownership from public to private hands will not necessarily reduce the cost or enhance the quality of services.

The Privatization Debate

Privatization, as it has emerged in public discussion, is not one clear and absolute economic proposition. Rather it covers a wide range of different activities, all of which imply a transfer of the provision of goods and services from the public to the private sector. For example, privatization covers the sale of public assets to private owners, the simple cessation of government programs, the contracting out of services formerly provided by state organizations to private producers, and the entry by private producers into markets that were formerly public monopolies. Privatization also means different things in different parts of the world—where both the fundamentals of the economy and the purpose served by privatization may differ.

One accounting of privatization appears in Raymond Vernon's *The Promise of Privatization,* a comparative analysis of international privatization activities of all sorts. According to Vernon's figures, by the late 1980s, the growth in state-owned enterprises in Africa, Asia, Latin America, and Western Europe had generated a nonfinancial state-owned sector accounting for an average of 10% of gross domestic product, with much higher shares in France, Italy, New Zealand, and elsewhere. In many developing countries, state-owned enterprises operated at substantial deficits and were responsible for as much as one-half of all outstanding domestic indebtedness. In many instances, Vernon says, privatization in these countries was

driven purely by the public sector's sorry financial condition. As conditions worsened in the early 1980s and credit markets tightened significantly, these governments sold off public assets to raise cash.

Contrary to the skeptics' assertion that governments won't sell the winners and can't sell the losers, governments sold off many prized assets in the 1980s. The most notable example is in the United Kingdom, where by 1987, the Thatcher government had shed more than $20 billion in state assets, including British Airways, British Telecom, and British Gas. Sales also ran into the billions of dollars in France and Italy, and many less developed countries sold off a large portion of their interests in public enterprises.

The story in the United States has been somewhat different, largely because the U.S. government has never had as many assets to privatize. Compare, for example, the concentration of public sector employment in other nations to that in the United States. In the late 1970s, nearly 7% of employees in other developed market economies worked in state-owned enterprises; the comparable figure for the United States was less than 2%. Unlike other industrialized countries where many of the utilities and basic industries are state-owned—and thus ripe targets for privatization—in the United States, the telecommunications, railroad, electrical power generation and transmission, gas distribution, oil, coal, and steel industries are entirely or almost entirely privately owned.

If there is a similar privatization phenomenon in the United States to the one Vernon describes in developing countries, it is in state and local governments where financial conditions in recent years have reached crisis proportions. Budgetary shortfalls have induced administrators to consider privatization as a means to avoid higher taxes or large cuts in services. Touche Ross surveys of state comptrollers in 1989 and city managers and county executives in 1987 show that the vast majority of state and local

governments contract out some services to private providers. The most often cited motivation for contracting out was to achieve operating cost savings; survey results from city and county administrators suggest that, in nearly every case, some cost savings were achieved. The second most often cited reason for contracting out was to solve labor problems with unionized government employees. Asset sales, on the other hand, were uncommon: only 5 state governments of the 31 that responded to the survey had used that approach.

A second impetus for privatization emerged in the United States in the 1980s. Privatization was a central piece of the Reagan administration's efforts to reduce the size of government and balance the budget. A book by former Reagan staffer Stuart Butler, *Privatizing Federal Spending: A Strategy to Eliminate the Deficit,* provides an intellectual rallying point for conservative efforts to reduce the federal government payroll and put a brake on the growth in government spending. Butler argues that private enterprises will cut costs and improve quality in an effort to gain profits and compete for more government contracts. Government providers, on the other hand, will pursue other objectives, such as increased employment or improved working conditions for government employees—initiatives that only result in higher costs, poorer quality, or both.

But most important, Butler contends, is that privatization can simply reduce the size of government. Fewer government workers and fewer people supporting a larger role for government means less of a drain on the nation's budget and overall economic efficiency.

Butler's arguments for privatization find sympathetic ears at the California-based Reason Foundation, which has been advocating privatization of both public assets and public services since the late 1970s. Using language designed to push the hot button of the average taxpayer, the foundation claims: "If your city is not taking full

advantage of privatization, your cost of local government may be 30% to 50% higher than it need be. The costs of state and federal government are also greater without privatization."

To the Reason Foundation, the benefits of privatization are clear and nearly universal; there seem to be no limits to the type of government activities that would benefit from privatization. Its annual report, *Privatization 1991,* considers privatization activities of all sorts around the world, always with a uniformly optimistic perspective. The message is clear: the shift in ownership or control from public to private hands will necessarily lead to cheaper, better services for the citizenry. As its press release states: "No service is immune from privatization."

This may sound extreme, but there is a practical experience to support its ideologically driven claim. Within the United States, an impressive array of cities and local governments has made effective use of privatization to improve efficiency, increase competition, and reduce expenditures. Consider the case of Chicago. City towing crews could not keep up with abandoned vehicles that littered the streets, so in 1989, the city government turned to a number of neighborhood companies. The private sector operators paid the city $25 per vehicle, which they then sold for scrap. What had been a drain on Chicago's resources turned into a $1.2 million bonanza. In addition, city crews were freed up to focus their efforts on illegal downtown parking.

Chicago also found that competition from the private sector could create incentives for public managers to be more effective. In 1990, city street-paving crews in Chicago were inspired to improve their performance when the city government decided to hire private contractors to pave adjacent wards. According to Mayor Richard M. Daley, both sets of crews began to compete "to see who could do the job faster and better."

Of course, all of the evidence is not on one side of the privatization debate. The expansion of the private sector into prisons, for example, has generated considerable controversy. As John Donahue reports in *The Privatization Decision: Public Ends, Private Means,* corrections departments in all but a few states have contracted with private firms to build prisons. And over two-thirds of all facilities for juvenile offenders are privately run, albeit most on a not-for-profit basis.

But in recent years, several large corporations have sought to extend the role of the private sector to the incarceration of adult criminals. This prospect of private corporations owning and operating prisons for adult offenders raises questions of costs and competition. As Donahue writes in a separate report on prisons: “Even if corrections entrepreneurs somehow succeed in cutting incarceration costs through improved management, there is unlikely to be enough competition, in any given community, to ensure that cost savings are passed on to the taxpayers, particularly after private contractors have become entrenched. Indeed, private prison operators insist on long-term contracts which buffer them from competition.”

Often privatization’s promises vastly exceed its results. In the Job Training Partnership Act (JTPA), for example, the federal government decided to relinquish most direct responsibility for job training. On the surface, the JTPA appears a resounding success: two-thirds of the adult trainees found jobs, and over 60% of youth trainees had positive experiences. But, JTPA local officials and training contractors can affect their measured performance by screening applicants.

The problem in the JTPA system is not private ownership, but the controls and performance measurements of the private owners. With only short-term performance measurements and no enforced imperative to create long-term value, JTPA’s statistics

give the impression that privatization has made much more difference for the employment, earnings, and productive capacity of American workers than it actually has.

As Donahue notes: “It is as if Medicaid physicians were presented with a population of patients suffering from complaints ranging from tendinitis to brain tumors, were asked to choose two or three percent for treatment, and then were paid on the basis of how many were still breathing when they left the hospital.”

In addition to the problems of insufficient competition and monitoring, there are broader objections to the no-holds-barred advocacy of privatization. While acknowledging that privatization may make sense on economic grounds, Paul Starr argues in his paper, “The Limits of Privatization,” that privatization will not always work best. “‘Best’ cannot mean only the cheapest or most efficient,” he writes, “for a reasonable appraisal of alternatives needs to weigh concerns of justice, security, and citizenship.”

Starr also attacks the claim that privatization leads to less government. He contends that profit-seeking private enterprises servicing public customers will find it in their interests to lobby for the expansion of public spending with no less vigor than did their public sector predecessors. In other words, privatization introduces a feedback effect in which influence on government now comes from the “enlarged class of private contractors and other providers dependent on public money.” This influence is especially dangerous if private companies skim off only the most lucrative services, leaving public institutions as service providers of last resort for the highest cost population or operations.

It is not hard to find examples of undue influence. Michael Willrich's *Washington Monthly* article, "Department of Self-Services," describes corrupt contracting practices in Mayor Marion Barry's Washington D.C. administration that led to several investigations, trials, and convictions. Willrich claims that Rasheeda Moore, Barry's former girlfriend, received $180,000 worth of contracts to run summer youth programs. In 1987, Alphonse Hill, a deputy mayor, was convicted of steering $300,000 in city contracts to a friend's auditing firm.

More generally, a lack of competition for government contracts actually leads to higher costs and creates perceptions of corruption. A *New York Times* special report, "The Contract Game: How New York Loses," provides several examples. New York City's Parking Violations Bureau hired American Management to help it design a system to bill for parking tickets and to record payment. As part of its consultancy, American Management wrote technical documents that became the basis for bid specification to build and implement the system. In 1987, the city awarded the $11 million contract to build and run the system to American Management, despite claims of impropriety from competing bidders. An audit by the New York State Comptroller showed that American Management had missed contract deadlines and that its system had billed millions of dollars in fines to New Yorkers who did not even own cars. The city had hoped to take over management of the system in 1990, but it has been unable to develop the necessary organization. Current plans anticipate city management in 1994. American Management has received a $10 million contract to run the system until 1992.

The *New York Times* report shows that noncompetitive bidding is commonplace in New York City. In fiscal years 1989 and 1990, 1,349 of 22,418 contracts recorded by the City Comptroller's Office attracted only single bids; several of the single-bid contracts were for multimillion dollar projects. Thousands of other contracts had two or three bidders, a circumstance conducive to "high cost, collusion, and corruption."

Even in the absence of corruption, however, Starr argues that privatization should not be considered in terms of economic efficiency alone. Less government, he states, is not necessarily better; therefore, just because privatization may reduce the role of government in the economy, it is not necessarily beneficial. The voter and consumer, Starr argues, are also interested in access, community participation, and distributive justice: “Democratic politics, unlike the market, is an arena for explicitly articulating, criticizing, and adapting preferences; it pushes participants to make a case for interests larger than their own. Privatization diminishes this public sphere—the sphere of public information, deliberation, and accountability. These are elements of democracy whose value is not reducible to efficiency.”

While it is clearly impossible to decouple privatization from the broader social and political issues raised by Butler and Starr, it seems logical that privatization decisions can and should be based primarily on pragmatic analyses of whether agreed-on ends can best be met by public or private providers. The ends need not be limited to efficiency; they need only be clearly specified in advance.

John Vickers and George Yarrow’s recent article, “Economic Perspectives on Privatization,” uses economic theory to show that there are flaws endemic in both private and public ownership: private ownership is not free of its own set of problems. In short, public provision suffers when public managers pursue actions that are not in the interests of the citizenry—for example, the employment of unnecessary workers or the payment of exorbitant wages. Private provision suffers when private managers take action inconsistent with the public interest—for example, performing shoddy work in an effort to boost profits or denying service when costs are unexpectedly high.

These issues, which only now are beginning to emerge in the privatization debate, have been showcased for managers in another context. They were central to the wave of leveraged buyouts in the late 1980s, which showed that private businesses also often suffer from managerial behavior inconsistent with shareholder interests. Takeover artists like Carl Icahn saw the same excesses in corporations that many people see in governmental entities: high wages, excess staffing, poor quality, and an agenda at odds with the goals of shareholders. Monitoring of managerial performance needs to occur in both public and private enterprises, and the failure to do so can cause problems whether the employer is public or private.

Managerial Control and Privatization

In the late 1980s, a wave of public company buy-outs swept across the previously insulated world of publicly traded corporations, prompted in large part by the failure of internal monitoring and control processes in these companies. These buyouts provide an important and useful analogy to privatization. In particular, Michael C. Jensen's analysis of these buyouts makes it clear why privatization alone is insufficient to guarantee that providers of important services will act in the public's interest.

In his HBR article, "Eclipse of the Public Corporation," Jensen argues that a variety of innovative organizational forms that reduce the conflict between the interests of owners and managers are replacing the publicly held corporation. The problem has been that managers in many industries, especially those with little long-term growth potential, have wasted company assets on investments with meager, if any, return. Managers have been consistently unwilling to return surplus cash to their shareholders, preferring to hold on to it for a number of reasons: excess cash provides managers with autonomy vis-à-vis the capital markets, reducing their need to

undergo the scrutiny of potential creditors or shareholders. And excess cash provides managers with an opportunity to increase the size of the companies they run, through capacity expansion or diversification.

This unwillingness to surrender cash to shareholders is not limited to a few companies. Jensen reports that, in 1988, the 1,000 largest public companies (ranked in terms of sales) generated a total cash flow of $1.6 trillion. Less than 10% of these funds were distributed to shareholders as dividends or share repurchases. Private managers, it seems, are vulnerable to the same claims levied against government agencies.

To monitor these tendencies on the part of public corporation managers, Jensen identifies three forces: product markets, the board of directors, and capital markets. The first two, says Jensen, have been falling short. Even the onslaught of international competition has been insufficient to prevent managers from squandering valuable assets. Moreover, boards of directors, consisting largely of outsiders selected by management who lack a large financial stake in the company's performance, are often unwilling or unable to prevent managerial initiatives that do not enhance shareholder value.

In short, managers have been able to make investments that do not maximize shareholder value because the processes assumed to be disciplining their behavior no longer function effectively. In recent years, it has fallen to the capital markets to assume the role of monitor. Jensen writes, "The absence of effective monitoring led to such large inefficiencies that the new generation of active investors arose to capture the lost value... Indeed, the fact that takeover and LBO premiums average 50% above market price illustrates how much value public company managers can destroy before they face a serious threat of disturbance."

The privatization of government assets and services has similar potential. But it should be clear from Jensen's finding that private ownership alone is not enough to make the difference. The key issue is how the private managers behave and what mechanisms will exist to monitor their actions.

It is significant that the firms that specialize in LBOs have organizational features that differ dramatically from the corporations they acquire. These key criteria—rather than the simple category of ownership—account for the difference in performance and prevent the waste of resources perpetuated by the preceding management.

1. Managerial incentives tie pay closely to performance. There are higher upper bounds, bonuses are linked to clearly identified performance measures such as cash flow and debt retirement, and managers have significant equity stakes.

2. The organization is more decentralized, as incentives and ownership substitute for direct supervision from headquarters.

3. Managers have well-defined obligations to debt and equity holders. The debt repayments force the distribution of cash flow, and cash cannot be transferred to cross-subsidize divisions.

The LBO firms, in sum, differ radically from most public corporations; it is the installation of these changes that created the value associated with the "reprivatization." Had no such organizational changes been clear to the capital markets, the share prices of target corporations would not have risen as a consequence of takeover activity.

Monopoly vs. Competition

Like the takeovers of public corporations, the privatization of government assets or services is a radical organizational change. The public seeks both monetary and nonmonetary value, including equal access to services, adherence to performance standards, and a lack of corruption. The public's goals for private garbage collection, for example, might include serving all members of the community (no matter how inconveniently located) at equal cost, disposing of waste in environmentally sound ways, and conducting honest bidding with city officials. But for these goals to be met, privatization will have to learn the same lesson taught by successful LBOs: managers must have effective incentives to act on behalf of the owners. The application of their lessons to privatization will help resolve the conflict between the public and the private providers, and identify cases where continued public provision makes sense.

The major criterion is easy to specify: privatization will work best when private managers find it in their interests to serve the public interest. For this to occur, the government must define the public interest in such a way that private providers can understand it and contract for it. The best way to encourage this alignment between the private sector and the public interest is through competition among potential providers, which may include governmental entities. Competitors will take it upon themselves to respond to the expressed wishes of the citizens.

The city of Phoenix's experience with garbage collection, described by David Osborne and Ted Gaebler in their forthcoming book, *Reinventing Government,* illustrates the crucial role played by competition. In 1978, the mayor announced that the city would turn over garbage collection to private firms. The Public Works director insisted that his department be allowed to bid against the private firms, even though the city had promised not to lay off any displaced Public Works employees as a result of contracting out. After losing in four successive bidding opportunities, in 1984, Public Works employees introduced a series of innovations that resulted in costs well below those of private firms; and the Public Works department won a seven-year contract

for the city's largest district. By 1988, Public Works had won back all five district contracts. The central lesson from this experience, says Phoenix city auditor Jim Flanagan, is that the important distinction is not public versus private—it is monopoly versus competition.

Competition is the first factor to help privatization; a second, also learned from LBOs, is linking the compensation of private managers directly to their achievement of mutually recognized goals that represent the public interest, goals which may include a variety of criteria like those Starr associates with the traditional role of government.

Osborne and Gaebler describe the extensive set of performance measurements used in Sunnyvale, California. City managers there are evaluated on the basis of service measures which include the quality of road surfaces, the crime rate and police expenditures per capita, the number of days when the air quality violates ozone standards, and the number of citizens below the poverty line. Departmental managers who exceed their "service objectives" receive annual bonuses that can be as much as 10 percent of their salary.

There is another reason why goals and performance measures are critical elements in making privatization work: the failure to hold private managers to agreed-on results can be very costly. In 1963, President Kennedy established Community Mental Health Centers to serve the mentally ill outside of large institutional settings. Osborne and Gaebler report that the National Institute of Mental Health gave millions of dollars to private firms to build and staff the centers—but established no monitoring process to track the results. A Government Accounting Office investigation in the late 1980s revealed that many centers had converted to for-profit status and served only those who could pay. Others provided psychotherapy to patients without serious mental illnesses. Meanwhile, write Osborne and Gaebler, "Perhaps a million mentally ill Americans wandered the streets sleeping in cardboard boxes or homeless shelters."

Pragmatic Privatization

As these and countless other examples make clear, there is a pragmatic way to view privatization. It is one arrow in government's quiver, but it is simply the wrong starting point for a wider discussion of the role of government. Ownership of a good or service, whether it is public or private, is far less important than the dynamics of the market or institution that produces it.

Strikingly, these issues of managerial control have first emerged in Eastern Europe. The question there is less what to privatize than how to privatize. And the new governments realize that a privatization scheme is only as efficient as it is politically palatable. In Poland, the recently adopted method for privatizing the massive state industrial sector involves issuing shares in newly privatized companies and putting all the shares of many companies into a mutual fund. A number of mutual funds would then control the shares of all the companies. Citizens would receive shares in the mutual funds that would not be tradable for, say, one year.

This plan is appealing because it provides equal access to the ownership of state assets and it offers citizens diversification against the tremendous risk of holding shares in any one or two companies. The shortcoming of the plan lies in its lack of control mechanisms. The fund managers must monitor the performance of many companies whose transitional problems are enormous. At the same time, there are no explicit incentives (other than reputation and patriotism) to ensure that fund managers act in the interests of shareholders. The short-term prohibition on trading shares between mutual funds further shields the managers from the immediate discipline of the financial markets. While these problems appear to be easy to anticipate, they have only recently come to light in Poland as politicians and economists begin to work through the details of the privatization program.

If the LBO experience teaches anything, it is that the focus of the privatization debate should be on the nature of organizational changes, not on a broad ideological debate over the role and efficacy of government. The replacement of public with private management does not of and by itself serve the public good, just as private ownership alone was not sufficient to maximize value to the shareholders of many large corporations.

Accountability and consonance with the public's interests should be the guiding lights. They will be found where competition and organizational mechanisms ensure that managers do what we, the owners, want them to do.

A version of this article appeared in the November-December 1991 issue of *Harvard Business Review*.

John B. Goodman is assistant professor at the Harvard Business School, where he specializes in business-government relations. He is the author of Monetary Sovereignty: The Politics of Central Banking in Western Europe(Cornell University Press, forthcoming in 1992).

Gary W. Loveman is the CEO of Harrah's Entertainment, in Las Vegas.

Leave a Comment

POST

0 COMMENTS

JOIN THE CONVERSATION

POSTING GUIDELINES

We hope the conversations that take place on HBR.org will be energetic, constructive, and thought-provoking. To comment, readers must sign in or register. And to ensure the quality of the discussion, our moderating team will review all comments and may edit them for clarity, length, and relevance. Comments that are overly promotional, mean-spirited, or off-topic may be deleted per the moderators' judgment. All postings become the property of Harvard Business Publishing.